141 — 358

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888. 90

No. ~~1489.~~ ~~735~~ 317

THE UNITED STATES, APPELLANT,

vs.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED JANUARY 11, 1889.

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1 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 26th day of November, 1888, proceedings were had and appear of record, in words and figures, following, to wit:

TUESDAY, *Nov.* 27, 1888.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY et al., respondents. } 5784.

Now, on this day, the cause above entitled coming on to be further heard, the complainant appeared by W. C. Perry, United States attorney, and John Martin, special assistant United States attorney, and the respondents each by their several attorneys; and it appearing to the court that the demurrer of the several defendants, to the amended bill of the complainant has been heretofore submitted, and an opinion of the circuit judge having been filed sustaining said demurrer, it is now here ordered, adjudged, and decreed that said demurrer to the amended bill aforesaid be, and the same is hereby, sustained, and the said amended bill is hereby dismissed; and to the sustaining of said demurrer and to the dismissal of said bill the complainant, by its said counsel, duly excepted, and still excepting, on their motion and application, an appeal of this cause to the Supreme Court of the United States is hereby allowed.

DAVID J. BREWER,
Circuit Judge.

2 In the circuit court of the United States for the district of Kansas, in equity.

To the judges of said circuit court:

The United States of America, by leave of court first obtained, brings this its amended bill of complaint against the Missouri, Kansas and Texas Railway Company (a corporation duly organized, constituted, and existing under the laws of the State of Kansas), J. W. Roll, M. H. Moore, W. H. McClure, H. H. Gardner, Andrew J. McKelvey, Nelson Kinsman, J. Wesley Jackson, Charles Carpenter, Isaac Wiley, Elvis Q. Sprague, Timothy B. Sweet, trustee, E. M. Sheldon, W. W. Sprague, estate of William Epley, C. B. Wilmoth, W. M. Hartman, J. S. Strickler, Smedley Darlington, Henry J. Benter, William Merchant, L. L. Northrup, John Clark, Phœnix Mutual Life Insurance Company (a corporation duly organized, constituted, and existing under the laws of the State of Connecticut), Van Fossen and Wilcox Investment Company (a corporation duly organized, constituted, and existing under the laws of the State of Kansas, successor to the Van Fossen and Wilcox Loan and Real Estate Bank), William Lane, Conrad Meuzer, John Moran, Henry Waters, Ebenezer Carrer, John Dunstee, Mary Gordon, William H. Gelshenen, James Ferguson, George D. Smith, Robert Smith, George W. Herdman, George A. Bowles, Thomas Robertshaw, Rosanah H. Travis, J. C. Reeder, Lorenzo D. Weisner, Rich-

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ard Brown, John Johnson, James O. Egle, Mutual Benefit Life Insurance Company (a corporation organized, constituted, and existing under the laws of the State of), Samuel M. Jarvis, Roland R. Conklin, and (partners doing business under the firm name and style of Jarvis, Conklin and Company), George W. Zike, John W. Bowman, A. Z. Funk, Thomas Bristee, J. W. Carroll, William Swartman, E. T. Walton, G. M. Nelson, John H. Moore, Edward Murphy, Samuel M. Knox, Joseph J. Carpenter, Henry S. Webster, John Montgomery, J. D. Rhoads,
3 Daniel White, Knox College (a corporation duly organized, constituted, and existing under the laws of the State of Illinois), Gilpin Buckingham, Amanda Buckingham, Mrs. M. A. Glover, H. M. Godwalt, Horace Wixon, M. J. Dayton, administrator of the estate of B. H. Dayton, deceased, David Byrum, Eva L. King, William A. Bishop, Hubert Barnum, J. W. Reed, Lizzie W. Barber, Edward E. Holmes, trustee, Kansas City Investment Company (a corporation duly organized, constituted, and existing under the laws of the State of Missouri), James H. Cowles, Joseph B. Eldridge, Samuel Hanson, Thomas Cation, John Cation, Crippen, Lawrence, and (partners doing business as Crippen, Lawrence and Company), Charles E. Shellings, Frank E. Stone, John Anthony Carter, Franklin D. Barr, A. D. Harlaw, H. C. Jones, J. E. Maxwell, M. Mendall, James A. Cramer, L. A. Moore, Thomas Lawless, John W. Whittington, Hattie A. Duffy, Iola Building and Loan Association (a corporation duly organized, constituted, and existing under the laws of the State of Kansas), O. H. Harlaw, Archie W. Kavanaugh, Pete L. Trotee, T. E. Rea, William Smith, Kate L. Malone, Neosho Valley Investment Company (a corporation duly organized, constituted, and existing under the laws of the State of Kansas), John Heller, T. C. Chapman, C. P. Walker, John Holzapfel, Frederick J. Pattee, John Morrison, Emily P. Morrison, James Pashinson, Western Farm Mortgage Company (a corporation duly organized, constituted, and existing under the laws of the State of Kansas), Alfred Vandergrift, Travelers Insurance Company (a corporation duly organized, constituted, and existing under the laws of the State of Connecticut), Angell Matthewson and (partners doing business as Angell Matthewson and Company), D. E. Pettigrew, Fannie S. Buskholder, Ezra G. Bennett, Isaac Fonda, assignee, Joseph M.
4 Samuels, R. J. Waddell, Frank Fowler, Z. Slusher, Martha A. Lamumyan, Mary T. Frederickson, N. Frederickson, Dorothy A. Richard, William H. Clinchy, James Clinchy, James H. Hopkins, Reuben Thomas, Elizabeth Loyster, Sarah E. Owen, Arminie J. Hardin, Rachael S. Crigler, George W. Gallagher, Joseph F. Stewart, James Stewart, Joshua Rumbel, William Pasha, Elizabeth Beck, Lombard Mortgage Company (a corporation duly organized, constituted, and existing under the laws of the State of Massachusetts), Jessie H. Hoffman, J. G. Norton, Joseph E. Gay, Juliet S. Whitney, William Kidd, Frederick Fisher, Luther Nichols, J. H. Ross, John H. Shockey, William Ellis Shockey, John M. Brown, John S. Martin, Samuel C. Varner, Mary Lawitzka, Sarah T. Hilless, W. E. Mitchell, William D. Hopkins, Jerome Sloan, William H. Burman, Nelson Burham, Annie W. Roberts, John Webster, Merilda Ann Ayers, David A. Ayers, Bernard Boehan, E. A. Barber, Catherine E. Cofenhafen, Henry Gay, heirs of James Ford, deceased, C. H. Pratt, Steven Pennington, Charles Englehardt, L. D. Romberger,

E. R. Verden, Marion L. Hedges, J. S. Kasbier, Patrick Flynn, M. D. Stout, Hiram Burson, Allen S. Bogart, Johnson Loan and Trust Company (a corporation duly organized, constituted, and existing under the laws of the State of Kansas), Iowa Mortgage Company (a corporation duly organized, constituted and existing under the laws of the State of Iowa), Joseph Cuep, E. Strosnidee, Jacob Orlando Baker, Jerusha Mills, L. W. Keplinger, G. W. Trash, James Wilson, A. A. McEwan, L. Hammerslough, P. S. Hoffman, ——— Huff and Jacob Simon (partners doing business in the firm name of Huff and Simon), L. W. Barbee, Joel Blakely, Carlos P. Keith, George J. C. Moore, Henry C. Daight, and Frederick R. Foster, trustees, Elizabeth A. Miller, M. M. Sherburn, Emil E. Aronson, Frank Anderson, G. W. Hutchinson, Elias Rhoads, J. H. Gorrell, L. H. Gorrell, Alex. Menson, Charles Smith, John M. Whittington, Jacob Atterholt, Laura
5 Adams, and Charles Aldrich; and thereupon your orator complains and says:

I. That on March 3d, 1863, and for many years prior thereto, your orator was the owner and in the exclusive possession of all the lands hereinbefore described, which said lands had been duly surveyed, and were public lands of the United States, and as such, on the date above stated, were subject to disposal by the Congress of the United States under the provisions of the homestead and pre-emption laws then and theretofore enacted and in force, unless, as averred in paragraph ten of this bill of complaint, said lands were Indian lands.

II. And your orator further avers that on the said 3d day of March, 1863, an act of Congress was enacted, which, among other things, provided as follows:

"That there be and is hereby granted to the State of Kansas for the purpose of aiding in the construction; First, of a railroad and telegraph line from the city of Leavenworth, by the way of the town of Lawrence, and via the Ohio City crossing of the Osage River, to the southern line of the State, in the direction of Galveston Bay, in Texas, with a branch from Lawrence, by the valley of the Wakarusa River, to the point on the Atchison, Topeka and Santa Fé Railroad where said road intersects the Neosho River.

Second. Of a railroad from the city of Atchison via Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Santa Fé, New Mexico, with a branch from where this last-named road crosses the Neosho, down said Neosho Valley to the point where the said first-named road enters the said Neosho valley, every alternate section of land designated by odd numbers for ten sections in width on each side of said road and each of its branches. But in case it
6 shall appear that the United States have, when the lines of route of said road and branches are definitely fixed, sold any section or part thereof, granted as aforesaid, * * * then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purpose aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated; provided, that the land to be so selected shall in no case be located further than twenty miles from the lines of said road and branches."

And your orator further avers that on the 26th day of July, 1886, an act of Congress was enacted making a grant of land to the State of Kansas for the purpose of aiding the Union Pacific Railroad Company, Southern branch, to construct a railroad from Fort Riley, Kansas or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, granting for the use and benefit of said railroad company, every alternate section of land, designated by odd numbers to the extent of five alternate sections per mile on each side of said road, and providing further that indemnity lands should be selected not beyond twenty miles from the line of said road, from the public lands of the United States nearest to the sections above specified; but providing further that any and all lands theretofore "reserved to the United States by any act of Congress, or in any other manner, by competent authority for the purpose of aiding in any object of internal improvement, or any purpose whatever, be, and the same are hereby reserved and excepted from the operation of this act, except so far as may be necessary to locate the route of said road through such reserved lands."

7 III. And your orator further avers that the defendant, the Missouri, Kansas and Texas Railway Company, is the successor and has succeeded to all the rights and liabilities of the Union Pacific Railroad Company, Southern Branch, mentioned in said act of Congress, approved July 26th, 1866.

IV. And your orator further avers that the said Missouri, Kansas and Texas Railway Company, as successor to the Union Pacific Railway Company, Southern Branch, under the terms and provisions of said act of July 26th, 1866, proceeded to and did construct, and since then has operated, a line of railroad between the terminal points mentioned in said act of Congress, said railroad having been constructed within ten years from the date of said act of Congress, as by said act required. But your orator further avers that, as required by said act of Congress of July 26th, 1866, on the 19th day of February, 1867, there was filed by said company with the Secretary of the Department of the Interior a map of the defendant's location of the Union Pacific Railroad, Southern Branch (now Missouri, Kansas and Texas Railway Company), from its northern terminus to the southern boundary of Allen County, in the State of Kansas, which was then accepted by said Secretary, a copy of which map of definite location through Allen County, in said State, is hereunto attached, marked Exhibit A, and prayed to be considered and treated as a part of this bill of complaint.

But your orator also avers and charges, upon information and belief, that said railway was not constructed on the line as marked on said map of definite location so filed with the Secretary of the Interior, but that the constructed line of the Missouri, Kansas and Texas Railway as originally built, and as the same has always been and now exists, is cor-

8 rectly shown on the map marked Exhibit A, and as above stated attached to and made a part of this bill of complaint; and that said constructed line is located at an average distance of nearly two miles from the line of route marked on said map of definite location, and at a point immediately west of the town of Humboldt, in Allen County, said road was constructed and has been since maintained deflecting from said

line of location over two and a half miles. Said road was not constructed through its entire length until July 9th, 1870, and your orator says that there was no engineering or other difficulty, or other fact, which rendered it impracticable for the Missouri, Kansas and Texas Railway Company, or its predecessor to construct or maintain its said road on the said line of its definite location; said location was fraudulently made by said company on a line to secure more and better lands than it could secure if the line of location had been on the line as constructed, and by reason thereof said company has received patents for large amounts of lands it could not and would not have received if the line of location had been on the line of construction. And your orator says, upon information and belief, that said company so constructed its said line of road in consideration of large amounts paid to it in the bonds of the incorporated city of Humboldt, payable for large sums of money and other valuable considerations which it agreed to receive and did receive for the construction and maintainance of its road so deflecting from its line of location. Your orator says that the Secretary of the Department of the Interior, under a mistake of his lawful powers, and in the mistaken belief that the Missouri, Kansas and Texas Railway Company and its predecessors had complied with the laws relating to said roads and lands, when in fact it had not, and under the mistaken belief that the laws gave said company a right to said lands so patented to it, and by reason of the false and fraudulent represen-
9 tations of said company, that it had constructed its road as required by law, which said Secretary mistakenly believed, he made the selection of lands and caused them to be patented to said company as herein stated. And the President of the United States caused to be signed, executed, and delivered to said company said patents by the same mistake of facts and of the law, and by reason of said false and fraudulent representation aforesaid. And your orator says that said company and its predecessors have always failed and refused to construct said road on the line of its definite location, and failed and refused to maintain a road on any such line, and failed and refused to carry the mails, troops, and other property of the United States and of many persons, and has failed and refused to carry passengers on any road constructed on said line of location, as required by law, whereby said company has failed to perform the conditions required of it by law, and so it is not entitled to hold said lands.

V. And your orator further avers that the Missouri, Kansas and Texas Railway Company, or its predecessor, the Union Pacific Railroad Company, southern branch, on the 19th day of March, 1866, attempted and pretended to take an assignment of all the rights, privileges, and grants of the Atchison, Topeka and Santa Fé Railroad Company, under the act of Congress of March 3d, 1863, so far as the said act of Congress applied to the branch road from the point where the Atchison, Topeka and Santa Fé Railroad crosses the Neosho River, down said Neosho Valley, to a point where the Leavenworth, Lawrence and Galveston Railroad enters the said Neosho Valley. And that on the 9th day of February, 1864, the State of Kansas, by an act of its legislature, accepted the grants provided for in the act of Congress of March 3d, 1863, upon the terms and con-
10 ditions mentioned in said act of Congress; and that subsequently, to wit, on the 26th day of February, 1867, said legislature pretended and attempted to concur in and ratify the aforesaid deed of assignment

from the Atchison, Topeka and Santa Fé Railroad Company, by a resolution regularly passed and adopted.

And that the said Missouri, Kansas and Texas Railway Company, subsequent to said assignment, filed with the Secretary of the Interior, as aforesaid, its map of definite location of its line, accepted by said Secretary February 19th, 1867, and with said map a statement declaratory of the purpose for which said company presented and filed such map, wherein said railway company claimed "all the grants for the construction of a railroad on any part of said line made to the State of Kansas by the act of Congress approved March 3d, 1863, and July 1st, 1864, said lands having been assigned to it by the Atchison, Topeka and Santa Fé Railroad Company, to which they were granted by the State by an act approved February 9th, 1864, accepting such grants;" and claiming also "all the lands granted to the State of Kansas for the Union Pacific Railway, southern branch, by the act of Congress approved July 26th, 1866." But your orator charges and avers that the alleged assignment from the Atchison, Topeka and Santa Fé Railroad Company to the Missouri, Kansas and Texas Railway Company was beyond the power of said corporations, utterly void and of no effect in law or equity, and was not ratified or confirmed by the legislature of the State of Kansas in a legal or valid manner, in this, to wit, that said assignment was pretended and attempted to be ratified and concurred in by joint resolution of said legislature, when in law and fact such ratification and concurrence could only be had by an act of said legislature regularly passed and enacted. And your orator says that said act of July 1st, 1864, entitled "An act making an additional grant of lands to the State of Kansas in aid of the construction of railroad and telegraph lines," was never accepted by the State of Kansas. And the Secretary of the Interior, in selecting lands for the Missouri, Kansas and Texas Railway Company and its predecessor, and the President of the United States, in causing patents to be issued for lands to said company, acted under the mistaken belief that said act of July 1st, 1864, had been accepted by said State and was duly in force as applied to said lands.

11

VI. And your orator further avers that under and by virtue of the several acts of Congress hereinbefore mentioned, and of the assignment from the Atchison, Topeka, and Santa Fé Railroad Company, as aforesaid, the defendant, the Missouri, Kansas and Texas Railway Company, after the construction and completion of its line of railroad between the termini mentioned in said act of Congress of July 26th, 1866, so as aforesaid constructed on an average of two miles from the line marked on its map of definite location, filed in the office of the Secretary of the Interior, made claim on your orator for patents conveying to it the fee-simple title to all and singular the lands, a full and correct list of which will be found in a paper hereto annexed, marked Exhibit B, and prayed to be considered and treated as a part of this bill of complaint.

And that pursuant to said claim made by the said Missouri, Kansas and Texas Railway Company, and by virtue of its false representations that it was so entitled to patents for said land under and by virtue of said act of Congress and said deed of assignment, your orator on November 3d, 1873, March 19th, 1875, August 17th, 1876, and April 23d, 1877, conveyed to said Missouri, Kansas and Texas Railway Company, by patent,

all and singular the lands aforesaid, and in said Exhibit B fully and particularly described—copies of which said patents are hereto at-
12 tached, marked Exhibit D, and prayed to be considered as part of this bill of compaint.

And that ever since the date of said patents the said Missouri, Kansas and Texas Railway Company, or its grantees, have been claiming to own the said lands in fee, and have attempted, and are still attempting, to exercise acts of ownership therein. And your orator attaches hereto a paper marked Exhibit C, which is prayed to be considered and treated as a part of this bill of complaint, showing as near as may be opposite to the name of each of the defendants in the caption of this bill of complaint mentioned the particular tract or local sub-division of land claimed by each.

VII. And your orator further avers that that the said Missouri, Kansas and Texas Railway Company was not entitled, under said acts of Congress, nor said deed of assignment from the Atchison, Topeka and Santa Fé Railroad Company, to any of the lands so patented to it and described in Exhibit B, for the reasons aforesaid; and for the reasons following, to wit, that under the act of Congress of March 3d, 1863, there was granted to the State of Kansas, and by act of the legislature of the said State, of date February 9th, 1864, there was granted to the Leavenworth, Lawrence and Galveston Railroad and the Atchison, Topeka and Santa Fé Railroad odd sections of land only, and by the same act of Congress the even sections within the limits of the grant made by said act were raised to double the minimum price and designated as sections and parts of sections of land which shall remain to the United States.

And your orator avers that the lands (a list of which is given in Exhibit B, as aforesaid) are partly within the ten-mile granted limits made by the said act of March 3d, 1863; and by said act of the legislature of Kansas of February 9th, 1864, in favor of said Leavenworth,
13 Lawrence and Fort Gibson Railroad Company, the name of which has been changed as herein stated, and the residue of said lands were outside of said ten-mile limits, but within the twenty-mile indemnity limits prescribed by said act in favor of said company, and within twenty miles of the line of location of said Union Pacific Railroad Company, southern branch, the name of which has been changed as aforesaid. The lands within the ten-mile limits of the road of said Leavenworth, Lawrence and Fort Gibson Railroad Company, the name of which has been changed as aforesaid, are described in the exhibit numbered , hereto annexed and made parthere of, and the residue of said lands so patented to the Missouri, Kansas and Texas Railway Company, within the twenty-mile limits of the road of said Leavenworth, Lawrence and Fort Gibson Railroad Company, are described in the exhibit numbered , hereto attached and made part hereof. And your orator says that by said several acts of Congress said lands were expressly reserved from the operation of the act of Congress of July 26th, 1866, the only act under which the Missouri, Kansas and Texas Railway Company can lawfully claim the land in controversy, that being the only act in which any right whatever is given to even sections.

VIII. And your orator further avers, as it has hereinbefore alleged, that the Missouri, Kansas and Texas Railway Company, claims under the act of March 3d, 1863, only by virtue of the assignment hereinbefore

(in paragraph 5) described from the Atchison, Topeka and Santa Fé Railroad Company, in connection with said act of Congress of July 1st, 1864; that the said assignment is utterly void and of no effect in law or equity, and that under the said act of March 3d, 1863, odd sections alone were granted, while the even sections within the limits of the said grant were expressly reserved to the United States.

14 And your orator says that said company could not lawfully claim any lands under the act of July 26th, 1866, between the point where the road of the Atchison, Topeka and Santa Fé Railroad Company crosses the Neosho River as it does at Emporia, and the point where the road of said Missouri, Kansas and Texas Railway Company crosses the road of said Leavenworth, Lawrence and Fort Gibson Railroad Company at Chanute on the south side of the Neosho River, in Neosho County, and said company received and accepted patents for odd sections of lands as granted to it between said points of crossing within ten miles of its line of road, and odd sections of land selected by it as indemnity lands and approved in its favor and patented to it under said act of 1863, alone within twenty miles of its line of road between said points of crossing. And said act of July 26th, 1866, has no application to lands along or opposite to the line of said road between said points of said crossings. And your orator says, that under the act of July 26th, 1866, it was provided that the selections of indemnity lands alone could be made from even sections of lands for the benefit of the Union Pacific Railroad Company, southern branch (now the Missouri, Kansas and Texas Railway Company), and that said even sections of indemnity land could only be selected between two lines—one drawn ten miles and the other twenty miles from the line of said road, as shown on its map of definite location, hereinbefore adverted to.

IX. And your orator further avers that no right to indemnity lands accrued to the Missouri, Kansas and Texas Railway Company until after the completion of its entire line of road, as required by said act of Congress of July 26th, 1866, and not until a selection was actually made of such lands, and that such selection was actually made of such lands, and

15 that such selections were partially made by it on August 20th, 1872, partially on July 29th, 1874, and partially on May 10th, July 12th, and December 6th, 1876, the portions of the lands so selected on each of said dates being fully shown in the copies of patents to this bill of complaint attached and marked Exhibit D. But your orator further avers that such selections so made by said railroad company were not approved by the Secretary of the Interior until a long time subsequent to the dates on which they were made by said defendant. And your orator says that prior to July 26th, 1866, and prior to the selection of said lands by said company, or by the Secretary of the Interior, a large number of actual and bona fide settlers over the age of twenty-one years, and citizens of the United States, each thus and otherwise having all the qualifications required by the homestead and pre-emption laws of the United States to obtain patents from the United States, each for a half quarter-section of said lands within ten miles of the located line of road of said Leavenworth, Lawrence and Fort Gibson Railroad Company, and its successor, and each for one quarter-section of said lands outside of said ten-mile limits, but within twenty miles of said line of road, in Allen County, in said State of Kansas,

claimed the right under said laws to take the necessary proceedings and do the acts requisite to obtain title under said laws, respectively, to such tracts of land, including most of the lands herein and in said patent mentioned. For this purpose sundry of such persons prior to July 26th, 1866, and prior to such selections, did each enter upon, occupy, and improve, as required by said laws, a half quarter-section of land, within said limit of ten miles, and others did each enter upon, occupy, and improve, as required by said laws, some each one half quarter-section of land, and others each a quarter-section of such lands. And sundry of such persons did each do all the acts required by and in all respects com-
16 ply with the homestead laws in due time to be entitled to occupy said tracts of half quarter sections, and said tracts of quarter-sections, and to claim and receive patents from the United States respectively therefor; and sundry other of said persons did each do all the acts required by and in all respects comply with the pre-emption laws in due time to be entitled to occupy said tracts of half quarter-sections and quarter-sections, and to claim and receive patents from the United States respectively therefor, and said persons respectively have ever since been, and yet are, each entitled to receive a patent conveying title to them respectively for said tracts of land so by each occupied and improved, including most of said lands herein and in said patent mentioned. And said persons have respectively ever since so entering upon said tracts of land continued to occupy and hold said lands by reason of the matters aforesaid, and yet claim and occupy them and are ready and willing and offer to do whatever may be lawfully required of them each to procure a patent from the United States. And the defendants, and those under whom they claim title, always well knew all the matters aforesaid, and none of them ever took or had possession of any of said lands, but all said lands have been in the occupancy and possession of other persons as aforesaid, claiming a right to obtain title thereto from the United States. Your orator says that it is unable now to specifically state what portion and tracts of said lands have been settled upon and occupied by actual bona fide settlers as aforesaid, and for which they are entitled to receive patents under the homestead and pre-emption laws as aforesaid, and permission is prayed to make proof thereof. Your orator also says that on the 19th day of March, 1867, the Commissioner of the General Land Office unlawfully addressed a letter or order to the register and receiver of the
17 local land office at Humboldt, in Allen County, Kansas, where all said lands mentioned in said letter were subject to be taken by settlers under said homestead and pre-emption laws, by which said register and receiver were each directed upon receipt of such letter to "reserve from sale, location, or entry of any kind, all the land outside of a line ten miles from the line of location of the road of said Union Pacific Railroad Company, southern branch, afterwards and now known as the Missouri, Kansas and Texas Railway Company, which letter was received by said register and receiver April 3d, 1867, and said lands were by them thereafter unlawfully reserved from sale, location or entry. Said railroad company had, on or about the — day of March, 1867, filed in the Department of the Interior its map of definite location of its said road. The lands so withdrawn from sale, location, and entry include numerous tracts of the lands described in the patents, copies of which are annexed hereto. A copy

of said letter is hereto annexed, marked Exhibit F, and made a part hereof. Said letters, reservations, and withdrawals were unauthorized by and in violation of law. On and after April 3d, 1867, said register and receiver each unlawfully proclaimed and made known the refusal of each to permit any citizen or settler to do any act to procure any title to any of such lands under any law, and they each refused to do or permit to be done by any citizen or settler any act requiring their official action or sanction to procure any right or title to any of said lands under any law.

Notwithstanding this, a large number of citizens of the United States, each over the age of twenty-one years, and otherwise having all qualifications required by said homestead and pre-emption laws, both prior to and on and after April 3d, 1867, and prior to any selection of such lands by or in favor of said railway company, each went upon, occupied,
18 and improved half quarter-sections of land and quarter sections of said land as aforesaid, and some of them each complied in all respects with the homestead laws, and some each complied with the pre-emption laws, and did every act necessary to procure patent for said lands so occupied by each, except only that said register and receiver would not permit any act to be done with or by them officially for the purpose of procuring title. Said persons have continued ever since to occupy and claim said lands and a right to perfect their respective titles each to the tract of land so occupied, and have always been and yet are ready and willing to do all acts required by and in all other respects to comply with said homestead and pre-emption laws, and so are respectively entitled to receive patents for the tracts of land respectively occupied and improved by each of said settlers on said lands, and said settlers have each made large, lasting, and valuable improvements on the respective tracts of land so occupied; and the defendants always well knew all the matters aforesaid. Your orator says it is unable now to specifically state what portion and tracts of said lands have been so settled upon, occupied, and improved, and prays permission to make proof thereof.

And that the said Missouri, Kansas and Texas Railway Company has sold, or agreed to sell, to sundry and various persons all the lands so described, and that the defendants mentioned in the caption to this bill of complaint and in Exhibit C, are now claiming said land in fee, or under said agreement to sell, or as mortagagees, as stated in said Exhibit C, but with notice of the rights of your orator and of the claimants under the homestead and pre-emption laws aforesaid.

X. And your orator further avers, upon information and belief, that the Missouri, Kansas and Texas Railway Company has received of your orator under the grants of lands made to it by Congress, patents
19 conveying title to 796,929 14 acres of lands, which is largely in excess of what it was lawfully entitled to, to wit, 252,929.14 acres, more or less, said railroad having constructed but eighty-five miles of railroad, for which it is entitled to lands under said grants. And having thus received of your orator more lands than it is entitled to under said grant, said Missouri, Kansas and Texas Railway Company is not entitled to the lands conveyed to it under the selections of dates as specified in paragraph 9 of this bill of complaint, nor any portion of the lands described in the paper attached to and made part of this bill of complaint

and marked Exhibit B, and as facts in support of this allegation your orator says: The Congress of the United States passed an act approved July 1st, 1862 (12 Stat., 489, sec. 3–9), entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the Government the use of the same for postal, military, and other purposes," by which act there was granted to the Leavenworth, Pawnee and Western Railroad Company every alternate section of public land designated by odd numbers to the amount of five alternate sections per mile, within the limit of ten miles on each side of a railroad said company was authorized to construct from the Missouri River at the mouth of the Kansas River, so as to connect with the Pacific Railroad at a point on the one hundredth meridian of longitude west from Greenwich. On the 14th of November, 1862, the Leavenworth, Pawnee and Western Railroad Company, a corporation named in said act, duly accepted the said act and the conditions thereof, and then filed such acceptance with the Secretary of the Interior as required in said act. The name of said corporation was soon thereafter changed to that of the Union Pacific Railroad Company, eastern divison. Said
20 Congress passed another act approved July 2nd, 1864 (13 Stat., 358, sec. 4–12), entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,'" approved July 1st, 1862, by which the grants of lands made by said act of 1862 in favor of said corporation last above mentioned was enlarged to ten sections of land per mile of road to be taken within twenty miles on each side of said road, and the line of said road was prescribed. Said acts contain other provisions, to which reference is made as part hereof. The name of said corporation mentioned in said act was soon after said act was approved changed to and since has been the Kansas Pacific Railway Company. Said corporation duly accepted said act and became entitled to all the land grant and indemnity land rights and other rights and privileges conferred by said acts of 1862 and 1864, and duly constructed the line of railroad required by said acts and performed the conditions of said acts and all acts relating to said corporation, and said lands and the rights of said corporation were fully vested during said years 1863 and 1864 and ever since. Your orator further says that the legislature of the State of Kansas by an act approved February 9th 1864, entitled "An act to accept a grant of land made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to the construction of such roads and telegraphs," did accept said act of Congress approved March 3d, 1863, and did designate as beneficiaries of the grants and privileges of said act the Atchison, Topeka and Santa Fé Railroad Company to construct said road mentioned in said act of 1863, from Atchison via Topeka to the west-
21 ern line of said State, and the branch thereof, and did designate the Leavenworth, Lawrence and Fort Gibson Railroad Company to construct said railroad from Leavenworth, by way of the town of Lawrence and via the Ohio City crossing of the Osage River, to the southern line of said State, and the branch thereof mentioned in said act. On the 16th of February, 1864, the Atchison, Topeka and Sante Fe Railroad Company

duly accepted the provision of said act, and thereby and otherwise became duly invested with and entitled to all the land grant and indemnity land rights and other privileges of said acts of Congress and of said legislature. 1864 said Leavenworth, Lawrence and Fort Gibson Railroad Company duly accepted the provisions of said act and thereby and otherwise became invested with and entitled to all the land grant and indemnity land rights and other privileges of said acts of Congress and of said legislature. Said Atchison, Topeka and Santa Fe Railroad Company, within the time limited by said acts, constructed said road from Atchison via Topeka to the western line of said State; and the Leavenworth, Lawrence and Fort Gibson Railroad Company, within the time specified in said acts, constructed said road from Lawrence, and via the Ohio crossing of the Osage River, to the southern line of the said State; and said corporations, respectively, became entitled to and received patents from the State of Kansas for the lands granted by said act within the granted limits of said roads, respectively. The name of said Leavenworth, Lawrence and Fort Gibson Railroad Company was subsequently changed to that of the Leavenworth, Lawrence and Galveston Railroad Company, and since then to that of the Kansas City, Lawrence and Southern Kansas Railroad Company. Said last named company failed to construct the road from Leavenworth to Lawrence, and did not become entitled to or receive any indemnity lands to be selected by the Secretary of the Interior
22 under the said act of 1863. The Missouri, Kansas and Texas Railway Company constructed its road, commencing at Fort Riley on the line of the road of the said Kansas Pacific Railway Company, thence down the valley of the Neosho River to the southern line of the said State, through the lands granted to and subject to selection as indemnity for said Kansas Pacific Railway Company, and through the lands granted to and subject to selection as indemnity for the Atchison, Topeka and Santa Fe Railroad Company. The total length of the road of the Missouri, Kansas and Texas Railway Company from Fort Riley to the north boundary of the Osage ceded lands near the south line of said State is only 125 miles, 20 of which is within the limits of the land grant made by said acts of Congress in favor of said Kansas Pacific Railway Company, and 20 of which is within the lands of the said land grant to the Atchison, Topeka and Santa Fe Railroad Company. Said Osage ceded lands are the lands mentioned in article two of the treaty between the United States and the Great and Little Osage tribes or nations of Indians, concluded June 2d, 1825 (7 Stat., 240), and said lands were by said treaty and by the acts of Congress aforesaid reserved to and for said Indians, and were not public lands of the United States. They were authorized to be sold by the joint resolution of Congress on that subject, approved April 10th, 1869. Your orator says that the line of road of the Missouri, Kansas and Texas Railway Company from its northern terminus to the southern boundary of the State of Kansas is in length about 175 miles; the line of that portion of said road between the point where the road of the Atchison, Topeka and Santa Fe Railroad Company crosses the Neosho River at Emporia, in Lyon County, north of Allen County, to the point where the road of said Missouri, Kansas and Texas Railway Company crosses the line of road of the Leavenworth, Lawrence
23 and Fort Gibson Railroad Company at Chanute, in Neosho County, south of Allen County, is in length about 59 miles, and that por-

tion of the road of said Missouri, Kansas and Texas Railroad Company which is in the said Osage ceded lands is in length about 29 miles. Your orator says that the Missouri, Kansas and Texas Railway Company never constructed any railroad under said acts of March 3d, 1863, July 1st, 1864, or July 26th, 1866, farther south than the town of Parsons, in Labette County, a distance of 157 miles by way of the railroad of said company from its northern teriminus at or near Fort Riley, but the road of said company running in a southerly direction from Parsons to the southern line of the State of Kansas was constructed as part of one main line of road running from Hannibal, on the eastern line of the State of Missouri, in a southwesterly direction through said State of Missouri; thence in the same general direction through the southeastern part of the State of Kansas to the southern line of said State of Kansas; thence in a southerly direction through the Indian Territory to Dennison, in the State of Texas; and said main line of said road was constructed under and by virtue of other laws than those acts of Congress aforesaid; and said main line through the State of Missouri and through the State of Kansas was by said company constructed and in operation long prior to the construction of said road from Emporia to Parsons and as a separate and distinct road, and said road from Parsons northward was a separate road as a branch of the main line of road from Hannibal, Missouri, to Dennison, in Texas; wherefore said company never was entitled to any indemnity lands. Said lands described in said patents to the Missouri, Kansas and Texas Railway Company, copies of which are annexed to this bill, were the last lands selected by the Secretary of the Interior, and the last lands patented under the provisions of said act of July 26th, 1866, author-
24 izing said Secretary to select lands for said company in lieu of lands lost from the grant in its favor, and said selections were wholly unauthorized and void. Copies of the lists of land, showing the date of selection, are hereto annexed, marked exhibit number and made part hereof.

XI. And your orator further avers that the lands described in Exhibit B are included within the New York Indian reservation, ceded to said Indian nation, or tribe, by the treaty of January 15th, 1838, which reservation has never been extinguished by any law or treaty, or judicially forfeited, or in any other manner whatsoever abrogated or set aside. And your orator avers that no railroad land grant or indemnity right did or can attach to lands included within said Indian reservation, and as facts in support of the above averments your orator alleges the following: [A map is hereto attached, marked Exhibit E, and made part hereof, showing the boundaries and extent of said New York Indian reservation so far as the lands in controversy are concerned, and as the same existed on August 6th, 1860.]

And on said August 6th, 1860, a letter was addressed by the then Commissioner of the General Land Office to the Commissioner of Indian Affairs, stating that the writer had been orally informed that it was the desire of the Indian Bureau to bring the New York Indian lands into market, and requesting the opinion of the Commissioner of Indian Affairs in the premises. No record of any answer to such letter from the Indian Bureau can be found, but on August 21st, 1860, a proclamation providing for the sale of said lands was duly signed by the then President of the United States; in conformity

with the terms of which said proclamation the said New York Indian lands were offered for sale, except as to a few particular tracts thereof which had been located by certain individual Indians, and which were ex-
25 cepted from sale by the said proclamation. But other than as above no steps were taken looking to the sale of said lands, and no steps whatever were taken to extinguish said Indian reservation or title, either by treaty statute or judicial decree, until the year 1868, in which year a treaty was concluded between the United States and the New York Indians for the surrender of all claims on the lands in controversy. But your orator avers that said treaty so concluded was not ratified by the Senate of the United States, and is not now, and never has been, of any legal or equitable effect.

In consideration whereof, and forasmuch as your orator can only have adequate relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, your orator prays that this honorable court may order, adjudge, and decree that the legal title in and to the said lands (so as aforesaid fully described in Exhibit B, attached to this bill and made a part thereof), as vested in your orator, and of right belongs to your orator, and that the patents (copies of which are attached to and made part of this bill of complaint and marked Exhibit D), be adjudged and decreed utterly void and of no effect in law or equity; and that said defendant, the Missouri, Kansas and Texas Railway Company, be required to bring the said patents into this honorable court, to be there delivered for cancellation; and that this honorable court will adjudge and decree that the said patents, and all deeds, conveyances, and contracts of sale, of whatever character, executed by said Missouri, Kansas and Texas Railway Company to its co-defendants herein, or to other parties, be declared void, and be considered a cloud on the legal title of your orator to said lands, and that said cloud be removed; and that this honorable court will further adjudge and decree that each of the several defendants
26 named in the caption to this bill of complaint and in the paper hereto attached and made part hereof, marked Exhibit A, together with said Missouri, Kansas and Texas Railway Company, are each and all, severally, without color, claim, or title to said lands and every part thereof; and that they, and each and all of them, and said Missouri, Kansas and Texas Railway Company be, severally and collectively, perpetually enjoined and restrained from setting up any claim, or title, or right, either in law or equity, in or to any of said lands, so as aforesaid described in Exhibit B to this bill of complaint; and that your orator may have such other, further, and different relief in the premises as the nature of the case may require, or as to equity and to this honorable court may seem meet and fit. To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, according to their best and utmost knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to each and all the matters and things in this bill of complaint contained, and that as fully and as particularly as if the same were here repeated paragraph by paragraph, and they were specially interrogated thereunto severally, may it please your honors to grant to your orator a writ of subpœna *adrespondendum*, issuing out of and under the seal of this honorable court, to be directed to said defendants, commanding each of them, on a

certain day and under a certain penalty, to be therein inserted, to appear before your honora in this honor'ble court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and, further, to stand to, perform, and abide by such further order or decree as to your honors shall seem meet. And your orator, as in duty bound, will ever pray, etc.

THE UNITED STATES OF AMERICA,
By A. H. GARLAND,
27 *Attorney-General of the United States,*
And by W. C. PERRY,
United States Attorney, District of Kansas,
and Solicitor for Complainant.

WM. LAWRENCE,
JOHN MARTIN,
Of Counsel.

UNITED STATES OF AMERICA,
District of Kansas, ss:

On this 7th day of December, 1887, before me personally appeared W. C. Perry, to me well known as such, and who being duly sworn did depose and say that he was and is United States attorney for the district of Kansas; that the foregoing bill of complaint is signed by him in his own proper handwriting; that he has read said bill and knows its contents, and that the matters and things therein contained are true of his own knowledge, except as to such matters as are stated on information and belief, and that as to those matters he believes them to be true.

W. C. PERRY.

Subscribed and sworn to before me this 7 day of December, 1887.
[SEAL.] A. S. THOMAS,
Clerk Circuit Court U. S., Dist. of Kansas.

(Endorsed:) No. 5784. Circuit court of the United States, district of Kansas. The United States of America vs. The Missouri, Kansas & Texas Railway Company et al. Amended bill of complaint. Filed Dec. 8, 1887. A. S. Thomas, clerk, by Frank H. Holt, deputy.

28 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of the amended bill of complaint filed Dec. 8, 1887, in case No. 5784, The United States of America vs. The Missouri, Kansas and Texas Railway Co. et al., except the exhibits to said amended bill. Said original exhibits are hereto attached per order of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 4th day of Dec., A. D. 1888.

[SEAL.] GEO. F. SHARITT, *Clerk.*

(Here follows map marked page 29.)

30

EXHIBIT B.

Abstract of lands in Allen Co., Kansas, patented to the Missouri, Kansas and Texas Ry. Co.

No.	Name of owner.	Name of mortgagee.	Part of section.	Sec.	Twp.	Range.
1	J. W. Roll	W. H. Moore	Pt. SW. ¼ of NE. ¼	24	23	18
2	W. H. McClure	H. H. Gardner	" " "	"	"	"
3	Andrew J. McKelvy	" " "	" " "	24	23	18
4	W. H. McClure	M. H. Moore	Pt. NW. ¼ of SE. ¼	"	"	"
5	"	H. H. Gardner	" " "	"	"	"
6	Andrew J. McKelvy		" " "	"	"	"
7	M., K. and T. R. R.		SE. ¼ of NE. ¼	20	23	19
8	Nelson Kinsman		W. ½ of NW. ¼	20	23	19
9	J. Wesley Jackson		E. ½ of SE. ¼	22	23	19
10	Charles Carpenter	J. Wesley Jackson	NE. ¼ of NE. ¼	26	23	19
11	Isaac Wiley		SE. ¼ of NE. ¼	"	"	"
12	Charles Carpenter	J. Wesley Jackson	SW. ¼ of NE. ¼	"	"	"
13	Same	Same	NW. ¼ of NE. ¼	"	"	"
14	Elvis O. Sprague	Timothy B. Sweet, trustee.	N. ½ of NW. ¼	"	"	"
15		E. M. Sheldon				
16	W. W. Sprague	Timothy B. Sweet E. M. Sheldon	SE. ¼ of NW. ¼	"	"	"
17	No pat. on record; no deed.		N. ½ of NE. ¼	28	"	"
18	E-tate of Wm. Epley		SE. ¼ of NE. ¼	"	"	"
19	C. B. Wilmoth	W. M. Hartman	SW. ¼ of NE. ¼	30	"	"
20	J. S. Strickler	Smedley Darlington, Henry J. Butler.	S. ½ of NW. ¼	"	"	"
21	C. B. Wilmoth		SE. ¼ of SE. ¼	"	"	"
22	William Merchant		All of	34	"	"
23	L. L. Northrup		NW. ¼	2	24	19
24	....do		NE. ¼	"	"	"
31]						
25	John Clark	Phœnix Mut. Life Ins. Co Van Fossen and Wilcox Loan & R. E. Bank.	SW. ¼	"	"	"
26	L. L. Northrup		SE. ¼	"	"	"
27	William Lane		NE. ¼	4	"	"
28	M., K. and T. Ry. Co.		SE. ¼ of NW. ¼	"	"	"
29	William Lane		SE¼	"	"	"
30	Conrad Menzer	Crippen, Lawrence & Co.	N. ½ of NE. ¼	8	"	"
31	John Moran	Henry Waters	E. ½ of NW. ¼	"	"	"
32	Ebenezer Carver	John Durnestee	S. ½ of SE. ¼	"	"	"
33	Mary Gordon, wf. of Donald Gordon.	L. L. Northrup	N. ½	14	"	"
34	Wm. H. Gelshenen	James Ferguson	W. ½ of SW. ¼	"	"	"
35	Geo. D. Smith	Robert Smith	SE. ¼	"	"	"
36	Wm. H. Gelshenen		NE. ¼	22	"	"
37	Same		NW. ¼	"	"	"
38	George W. Herdman		E. ½	24	1	1
39	Geo. A. Bowlus and W. M. Hartman.		NW. ¼	"	"	"
40	Thomas Robertshaw	M. H. Moore	SW. ¼	24	"	"
41	Rosamond H. Travis		SE. ¼	28	"	"
42	J. C. Ruder	L. L. Northrup	NE. ¼	34	"	"
43	Lorenzo D. Weisner	Richard Brown	NW. ¼	"	"	"
44	Same	Same	NE. ¼ of SW. ¼	"	"	"
45	John Johnson		SE. ¼	"	"	"
46	James O. Egle	Mut. Benefit Life Ins. Co., Jarvis, Conklin & Co.	E. ½ of SE. ¼	2	25	19
47	George W. Zike	John W. Bowman	N. ½ of NW. ¼	10	"	"
48	A. Z. Funk		NE. ¼ of SW. ¼	12	"	"
49	Thomas Brister	M. H. Moore	SW. ¼ of SW. ¼	"	"	"
50	Same	Same	SE. ¼ of SW. ¼	"	"	"
51	A. Z. Funk		SE. ¼	"	"	"
52	J. W. Carroll		W. ½ of NE. ¼	14	"	"
53	William Swaitman		S. ½ of NW. ¼	"	"	"
54	J. W. Carroll	G. M. Nelson	E. ½ of SW. ¼	"	"	"
55	E. T. Walton	John H. Moore	SE. ¼	"	"	"
32]						
56	Edward Murphy		NE. ¼	22	25	19
57	Same		NW. ¼	"	"	"
58	Saml. M. Knox		SW. ¼	"	"	"
59	Same		SE. ¼	"	"	"
60	Joseph J. Carpenter		NE. ¼	24	"	"
61	Henry S. Webster		NW ¼	"	"	"
62	Same		SW. ¼	"	"	"
63	Joseph I Carpenter John Montgomery holds tax deed.		SE. ¼	"	"	"
64	Samuel M. Knox		NE. ¼	26	"	"

EXHIBIT B.—*Abstract of lands in Allen Co., Kansas, etc.*—Continued.

No	Name of owner.	Name of mortgagee.	Part of section.	Sec.	Twp.	Range.
65	Same		NW. ¼	26	25	19
66	J. D. Rhoades		SW. ¼	"	"	"
67	Daniel White	Knox College	SE. ¼	"	"	"
68	Gilpin Buckingham	Amanda Buckingham	E. ½ of SW. ¼	2	26	19
69	Same	Mrs. M. A. Glover	W. ½ of SW. ¼	"	"	"
70	Same	H. M. Godwalt	SE. ¼	"	"	"
71			(*)			
72	Horace Wixson	B. H. Dayton	NE. ¼	10	26	19
73	David Byrum	Eva L. King	SE. ¼	"	"	"
74	William A. Bishop		N. ½	12	"	"
75	Hubert Barnum		SW. ¼	"	"	"
76	J. W. Reed (no deed recorded).		SE. ¼	"	"	"
77	Lizzie W. Barber	Edward E. Holmes, trustee, & Kansas City Ins. Co.	All of	14	"	"
78	Same	Jas. N. Cowles & Jos. B. Eldridge.	E. ½ of SE. ¼	22	"	"
79	Samuel Hanson		E. ½ of NE. ¼	"	"	"
80	Samuel M. Knox		NE. ¼	24	"	"
81	Same		NW. ¼	"	"	"
82	Thomas Cation		SW. ¼	"	"	"
83	John Cation (no deed recorded).		Lot 2	26	"	"
84	Rebecca Davis	Crippen, Lawrence & Co.	Lots 3 and 4	"	"	"
85		Crippen, Lawrence & Co				
33]						
86	Charles E. Shellings (no deed recorded).		NE. ¼	20	23	20
87	Frank E. Stone	Phœnix Mutual Life Ins. Co.	NW. ¼	"	"	"
		Van Fossen & Wilcox Loan & R. E. Bank.		"	"	"
88	John Anthony Castee	Timothy B. Sweet, trustee, &c.	N. ½ of SW. ¼	"	"	"
89	Franklin D. Barr	A. D. Harlan	S. ½ of SW. ¼	"	"	"
90		H. C. Jones & J. E. Maxwell.				
91	M. Mendall		SE. ¼	"	"	"
92	James A. Cramer	Timothy B. Sweet, trustee, &c.	N. ½ of NW. ¼	26	"	"
93	Same	Same	SW. ¼ of NW. ¼	26	"	"
94	Same	Same	NW. ¼ of SW. ¼	"	"	"
95	L. A. Moore	Phœnix Mutual Life Ins. Co.	SW. ¼ of SW. ¼	"	"	"
		Van Fosser & Wilcox L. & R. E. Bk.		"	"	"
96	Thomas Lawless		SE. ¼ of SW. ¼	"	"	"
97	Thomas Lawless		SW. ¼ of SE. ¼	"	"	"
98	L. L. Northrup		NE. ¼	32	23	20
99	Same		NW. ¼	"	"	"
100	John W. Whittington	John H. Moore	NE. ¼	28	"	20
101	Same	Same	SE. ¼	"	"	"
102	John W. Whittington		SW. ¼	"	"	"
103	Geo. A. Bowlers		SW. ¼ of NW. ¼	"	"	"
104	Hattie A. Duffy	Iola B'd'g & Loan Ass'n.	SE. ¼ of NW. ¼	"	"	"
105	O. H. Harlan, L. L. Northrup (tax deed).		N. ½ of NW. ¼	"	"	"
106	Archie W. Kavanaugh	Pete L. Trotter, use of T. E. Rea.	NW. ¼	30	23	20
107	L. L. Northrup		SW. ¼	32	"	"
108	L. L. Northrup		SE. ¼	"	"	"
109	William Smith	Kate L. Malone	NE ¼	34	"	"
		Neosto Valley Ins. Co				
110	John Heller		NW. ¼	"	"	"
111	Same		SW. ¼	"	"	"
112	Jacob Atterbolt		SE. ¼	"	"	"
113	L. L. Northrup		All of	4	24	20
114	F. C. Chapman		NE	6	"	"
115						
34]						
116	C. P. Walker & John Holzaptel.	Frederick J. Potter	N. ½ of NW. ¼	6	24	20
117	Same	Same	S. ½ of NW. ¼	"	"	"
118	John and Emily P. Morrison (h'rs of).		SW. ¼	"	"	"
119	Laura Adams	Jos. Pashinson	SE. ¼	"	"	"
		Western Farm M't'g Co.				

*Odd sections.

EXHIBIT B.—*Abstract of lands in Allen Co., Kansas, etc.*—Continued.

No.	Name of owner.	Name of mortgagee.	Part of section.	Sec.	Twp.	Range.
120	Alfred Vandergrift	Travelers' Ins. Co	NE. ¼	8	24	20
		Angell Matthewson & Co.				
121	M. K. & T. Ry. Co		NW. ¼	"	"	"
122	Same		SW. ¼	"	"	"
123	D. E. Pettegrew		SE. ¼	"	"	"
124	Fannie S. Buckholder	M. H. Moore	NE. ¼	10	24	20
125	" " "	Ezra G. Bennett	N. ½ of SE. ¼	"	"	"
126	Charles Smith		S. ½ of SE. ¼	"	"	"
127	Joseph M. Samuels	Isaac Fonda, assignee of R. J. Waddell.	NW. ¼	"	"	"
		R. J. Waddell				
128	Frank Fowler		E. ½ of SW. ¼	"	"	"
129	L. L. Northrup		W. ½ of SW. ¼	"	"	"
130	Z. Slusher	Martha A. La Munyan	NW. ¼	12	"	"
131	L. Northrup		SW. ¼	"	"	"
132	Geo. A. Bowlees		NE. ¼ of NE. ¼	14	"	"
133	Mary T. Frederickson		SW. ¼ of NE. ¼	"	"	"
134						
135	N. Frederickson	Mrs. Dorothy A. Richard	SE. ¼ of NW. ¼ and W. ½ of NW. ¼	14	"	"
136	William H. Clinchy		NE. ¼	20	24	20
137	L. L. Northrup		All of	18	"	"
138	N. Frederickson		SW. ¼	14	"	"
139	Same		W. ½ of SE. ¼	"	"	"
140	James Clinchy		NW. ¼	20	"	"
141	William H. Clinchy		SW. ¼	"	"	"
142	Same		SE. ¼	"	"	"
143	James M. Hopkins		All of	22	"	"
144	Reuben Thomas		E. ½ of SW. ¼	24	"	"
145	Mrs. Elizabeth Loyster		W. ½ of SW. ¼	"	"	"
35]						
146	James Clinchy		All of	28	24	20
147	Sarah E. Owen	Arminie J. Hardin	All of	30	"	"
148	Rachel S. Crigler	George W. Gallagher	SW. ¼	32	"	"
149	Joseph F. Stewart	James Stewart	NE. ¼	"	"	"
150	Joshua Rumbel		NW. ¼	"	"	"
151	William Pasha		SE. ¼	"	"	"
152	Elizabeth Beck	Lombard Ins. Co	60 A. off E. side NE. ¼	34	"	"
153	Jessie H. Coffman	Mutual Benefit Life Ins. Co.	100 A. off W. side NE. ¼	"	"	"
154	J. G. Norton	Joseph E. Gay	NW. ¼	"	"	"
155	Juliet S. Whitney	William Kidd	W. ½ of SW. ¼	"	"	"
156	Jessie H. Coffman	Mutual Benefit Life Ins. Co.	E. ½ of SW. ¼	"	"	"
157	Same	Same	SE. ¼	"	"	"
158	Fred Fisher		NE. ¼	2	25	20
159	Luther Nichols		NW. ¼	"	"	"
160	J. H. Ross		SW. ¼	"	"	"
161	John H. Shockey		S. ½ of SE. ¼	"	"	"
162	William Ellis Shockey		N. ½ of SE. ¼	"	"	"
163	John M. Brown		NE. ¼ of NE. ¼	8	25	20
164	Same		NW. ¼	"	"	"
165	John S. Martin		N. ½ of	4	"	"
166	Samuel C. Varneer	Mutual Benefit Life Ins. Co.	S. ½ of	"	"	"
		Jarvis Conklin & Co.				
167	Mary Lawitzka	Sarah T. Hillers	SW. ¼	6	"	"
168	W. E. Mitchell		SW. ¼	8	"	"
169	Charles Aldrich		SE. ¼	"	"	"
36]						
170	William D. Hopkins		NW. ¼	12	25	20
171	Charles Aldrich		SW. ¼	"	"	"
172	Jerome Sloan		E. ½ of	14	"	"
173	William H. Burman		NW. ¼	"	"	"
174	Nelson Burnham		SW. ¼	"	"	"
175	Annie W. Roberts		NE. ¼	18	"	"
176	Same		NW. ¼	"	"	"
177	John Webster		SW. ¼	"	"	"
178	Same		SE. ¼	"	"	"
179	Merilda Ann Ayers		NE. ¼	20	"	"
180	David A. Ayers		NW. ¼	"	"	"
181	Bernard Boehen	B. H. Dayton & E. A. Barber.	SW. ¼	"	"	"
182	Catherine E. Copenhafn	Henry Gay, Kansas City Ins. Co.	W. ½ of SE. ¼	"	"	"
183	Merilda Ann Ayers		E. ½ of SE. ¼	"	"	"
184	Nelson Burnham		NE. ¼	22	"	"
185	Same		NW. ¼	"	"	"

EXHIBIT B.—*Abstract of lands in Allen Co., Kansas, etc*—Continued.

No.	Name of owner.	Name of mortgagee.	Part of section	Sec.	Twp.	Range.
186	Same		SW. ¼	22	25	20
187	Heirs of James Ford, dec'd.		SE. ¼	"	"	"
188	Nelson Burnham		W. ½ of	24	"	"
189	C. H. Pratt		SE. ¼	"	"	"
190	E. A. Barber		NE. ¼	"	"	"
191	Stephen Pennington		W. ½ of NE. ¼	26	"	"
192	Charles Englehardt		E. ½ of SE. ¼	"	"	"
193	Nelson Burnham		W. ½ of SE. ¼	"	"	"
194	Same		W. ½	"	"	"
195	L. D. Romberger & E. R. Verden.		NE. ¼	28	"	"
196	Same		NW. ¼	"	"	"
197	Same		SW. ¼	"	"	"
198	Same		SE. ¼	"	"	"
199	Marian L. Hedges, wf. of John R. Hedges.		NE. ¼	30	"	"
200	J. S. Hasbur		NW. ¼	"	"	"
201	Same		SW. ¼	"	"	"
37]						
202	M., K. & T. Ry. Co		N. ½ of SE. ¼	30	25	20
203	Patrick Flynn		S. ½ of SE. ¼	"	"	"
205	Nelson Burnham		N. ½	32	"	"
206	M., K. T. Ry. Co		NE. ¼ of NE. ¼	34	"	"
207	Same		W. ½ of NW. ¼	"	"	"
208	Same		E. ½ of SW. ¼	"	"	"
209	M., K. & T. Ry. Co		SE. ¼ of NE. ¼	2	26	20
210	M., K. & T. Ry. Co		SE. ¼ of NW. ¼	"	"	"
211	This land is not held by or through R. R. Co. Error in Pat.		N. ½ of NW. ¼	"	"	"
212	M., K. & T. Ry. Co		SW. ¼ of NE. ¼	"	"	"
213	Same		E. ½ of SE. ¼	"	"	"
214	Same		W. ½ of SE. ¼	"	"	"
215	M. D. Stout	Knox College	S. ½ of NE. ¼	4	26	20
216	L. L. Northup, by tax deed M., K. & T. Ry. Co.		NW. ¼	"	"	"
217	Same		SE. ¼	"	"	"
218	F. C. Chapman	Johnson Loan & Trust Co.	NE. ¼	6	"	"
219	Hiram Burson	Iowa Mortgage Co	NW. ¼	"	"	"
220	Allen S. Bogart		Part SW. ¼	"	"	"
221	Joseph Culp, and.		" "			
222	E. Stousidee		" "			
223	Jacob Orlando Baker	Jerusha Mills	SE. ¼	"	"	"
224	L. W. Heplinger		NE. ¼	8	"	"
225	G. W. Trask		NW. ¼	"	"	"
226	E. A. Barber		SW. ¼	"	"	"
227	L. W. Heplinger		SE. ¼	"	"	"
228	James Wilson		W. ½ of NW. ¼	10	"	"
229	M., K. & T. Ry. Co		SE. ¼ of SE. ¼	"	"	"
230	Nelson Burnham		All of	12	"	"
231	Same		All of	14	"	"
232	A. A. McEwan	L. Hammerslough	E. ½ of NE. ¼	18	"	"
233	M., K. & T. Ry. Co		W. ½ of NE. ¼	"	"	"
234	Same		NW. ¼	"	"	"
38]						
235	P. S. Hoffman		SW. ¼	18	26	20
236	Same		SE. ¼	"	"	"
237	Huff & Simon	Phoenix Mut. Life Ins. Co. Van Fossen & Wilcox, Loan & R. E. Bk.	NW. ¼	20	"	"
238	L. W. Barber	Edward E. Holmes, trustee, &c., Kan. City Ins. Co.	E. ½ of SW. ¼	"	"	"
239	Joel Blakeley		All of	22	"	"
240	Same		"	24	"	"
241	M., K. & T. Ry. Co		Lot 1 in	26	"	"
242	Same		" 2 "	"	"	"
243	Same		" 1 "	28	"	"
244	Same		" 2 "	"	"	"
245	Carlos P. Keith	George J. H. Moore, Henry C. Darght, and Frederick R. Foster, trustees Van Fossen & Wilcox.	W. ½ of SW. ¼	30	24	21
246	Edizabeth A. Miller		NW. ¼	6	25	21
247	W. M. Hartman		SW. ¼	"	"	"

EXHIBIT B.—*Abstract of lands in Allen Co., Kansas, etc.*—Continued.

No.	Name of owner.	Name of mortgagee.	Part of section.	Sec.	Twp.	Range.
248	Nelson Burnham		All of	30	25	21
249	M. M. Sherburn		NW. ¼	32	"	"
250	M., K. & T. Ry. Co		E. ½ of NE. ¼	6	26	"
251	Same		W. ½ of NW. ¼	"	"	"
252	E. A. Barber		S. ½	"	"	"
253	M., K. & T. Ry. Co		W. ½ NE. ¼	8	"	"
254	Same		NW. ¼	"	"	"
255	Same		SW. ¼	"	"	"
256	Same		W. ½ SE. ¼	"	"	"
257	Same		NE. ¼	18	"	"
258	Same		NW. ¼	"	"	"
259	Same		SW. ¼	"	"	"
260	Same		SE. ¼	"	"	"
261	Same		NE. ¼	20	"	"
262	Same		NW. ¼	"	"	"
39]						
263	Emil E. Aronson		SW. ¼	20	26	21
264	Frank Anderson	Alex. Mauren	SE. ¼	"	"	"
265	M., K. & T. Ry. Co		Lot 1 in	30	26	21
266	G. W. Hutchinson		" 2 "	30	26	21

40 EXHIBIT C.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 7th, 1886.

I, S. M. Stockslager, Acting Commissioner of the General Land Office, do hereby certify that the annexed abstract copy of a patent issued to the Missouri, Kansas and Texas Railway Company, November 3rd, 1873, is a true and literal exemplification of that portion of the original to which it relates as recorded in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] S. M STOCKSLAGER,
Acting Commissioner of General Land Office.

40½ THE UNITED STATES OF AMERICA,

To all to whom these presents shall come, greeting:

No. 5. Whereas by the act of Congress approved July 26th, 1866, entitled "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," authority is given to the Union Pacific Railway Company, South Branch, "now known as the Missouri, Kansas and Texas Railway Company" of Kansas, a corporation existing under the laws of said State, to construct a railroad and telegraph line under certain conditions and stipulations as expressed in said act; and provision is made for granting to the State of Kansas, for the use and benefit of said railroad company every alternate section of land, or parts thereof, designated by odd numbers to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile.

And whereas it is further enacted that "in case it shall appear that the

United States have, when the line of said road is definitely located, sold any sections or any parts thereof, granted as aforesaid, or that the right of pre-emption or homestead settlements has attached to the same," then so much land is set apart to be selected for the purpose aforesaid, nearest to the sections above specified: Provided, That said lands hereby granted as indemnity shall not be selected beyond twenty miles from the line of said road.

And whereas it is further enacted by the 3d section of the aforesaid act that " when the governor of the State of Kansas shall certify " that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner, as a first-class railroad, patents shall issue to said company for the lands thereby granted.

And whereas it is indicated by letter of the Secretary of the Interior to the Commissioner of the General Land Office, dated July 25th, 1870, and map therewith, duly certified by the governor of the State of Kansas, that the said " Missouri, Kansas and Texas Railway Company " has
41 fully completed and equipped, as required by the act, the said railroad, from Junction City to the southern boundary of the State of Kansas.

And whereas certain tracts have been selected under the act aforesaid by Isaac T. Goodnow, land commissioner of the " Missouri, Kansas and Texas Railway Company," as shown by his original lists of selections, dated August 10th, 1872, and certified under date of April 14, 1873, by the register and receiver at Independence, Kansas.

The said tracts being described as follows, to wit, south of base line and east of the sixth principal meridian, Kansas.

Twenty miles limit. Independence district.

* * * * * * *

Township twenty-three, range eighteen.

* * * * * * *

Southwest quarter of northeast quarter and northwest quarter of southeast quarter of section twenty-four, containing eighty acres.

Township twenty-three, range nineteen.

* * * * * * *

West half of northwest quarter of section twenty, containing eighty acres. East half of southeast quarter of section twenty-two, containing eighty acres. East half of northeast quarter, southwest quarter of northeast quarter, northwest quarter of northwest quarter, and southeast quarter of northwest quarter of section twenty-six, containing two hundred acres. Southeast quarter of northeast quarter of section twenty-eight, containing forty acres. Southwest quarter of northeast quarter and south half of northwest quarter of section thirty, containing one hundred and fourteen acres and thirty-seven hundredths of an acre. Northeast quarter, south half of northwest quarter, and south half of section thirty-four, containing four hundred and sixty acres.

42 Township twenty-four, range nineteen.

All of section two, containing six hundred and thirty-two acres and seventy-two hundredths of an acre. Northeast quarter and southeast quarter

of northwest quarter of section four, containing one hundred and ninety-eight acres and eighty-two hundredths of an acre. North half of northeast quarter and south half of southeast quarter of section eight, containing one hundred and sixty acres. West half of southwest quarter, southeast quarter, and north half of section fourteen, containing five hundred and sixty acres. North half of section twenty-two, containing three hundred and twenty acres. All of section twenty-four, containing six hundred and forty acres. Southeast quarter of section twenty-eight, containing one hundred and sixty acres. Northwest quarter of northwest quarter, southwest quarter of northwest quarter, and northeast quarter of southwest quarter of section thirty-four, containing one hundred and twenty acres.

Township twenty-five, range nineteen.

East half of southeast quarter of section two, containing eighty acres. East half of southeast quarter of section twelve, containing eighty acres. West half of northeast quarter, south half of northwest quarter, east half of southwest quarter, and southeast quarter of section fourteen, containing four hundred acres. West half of southwest quarter, east half of southwest quarter, southeast quarter, and north half of section twenty-two, containing six hundred and forty acres. All of section twenty-four, containing six hundred and forty acres. All of section twenty-six, containing six hundred and forty acres.

Township twenty-six, range nineteen.

East half of southwest quarter and west half of southeast quarter of
43 section two, containing one hundred and sixty acres. Northeast quarter and east half of southeast quarter of section ten, containing two hundred and forty acres. All of section twelve, containing six hundred and forty acres. All of section fourteen, containing six hundred and forty acres. East half of northeast quarter and east half of southeast quarter of section twenty-two, containing one hundred and sixty acres. Northeast quarter and west half of section twenty-four, containing four hundred and eighty acres. Lots numbered one, two, three, and four of section twenty-six, containing one hundred and twenty-eight acres and thirty-six hundredths of an acre.

Township twenty-three, range twenty.

* * * * * * *

All of section twenty, containing six hundred and forty acres. North half of northwest quarter, southwest quarter of northwest quarter, west half of southwest quarter, southeast quarter of southwest quarter, and southwest quarter of southeast quarter of section twenty-six, containing two hundred and eighty acres. All of section twenty-eight, containing six hundred and forty acres. Northwest quarter of section thirty, containing one hundred and sixty-six acres and forty-two hundredths of an acre. All of section thirty-two, containing six hundred and forty acres. All of section thirty-four, containing six hundred and forty acres.

Township twenty-four, range twenty.

All of section four, containing six hundred and thirty-nine acres and twenty-eight hundredths of an acre. South half of northeast quarter, southeast quarter, and west half of section six, containing five hundred and fifty-nine acres and sixty-two hundredths of an acre. All of section eight, containing six hundred and forty acres. All of section ten, containing six hundred and forty acres. West half of section twelve,
44 containing three hundred and twenty acres. Northeast quarter of northeast quarter, southwest quarter of northeast quarter, west half of northwest quarter, southeast quarter of northwest quarter, southwest quarter, and west half of southeast quarter of section fourteen, containing four hundred and forty acres. All of section eighteen, containing six hundred and fifty acres and twenty hundredths of an acre. All of section twenty, containing six hundred and forty acres. All of section twenty-two, containing six hundred and forty acres. Southwest quarter of section twenty-four, containing one hundred and sixty acres. All of section twenty-eight, containing six hundred and forty acres. All of section thirty, containing six hundred and fifty-eight acres and fify-six hundredths of an acre. All of section thirty-two, containing six hundred and forty acres. All of section thirty-four, containing six hundred and forty acres.

Township twenty-five, range twenty.

All of section 2, containing six hundred and thirty-seven acres and ninety-two hundredths of an acre. All of section four, containing six hundred and thirty-nine acres and sixteen hundredths of an acre. Southwest quarter of section six, containing one hundred and sixty-six acres and nine hundredths of an acre. Northeas tquarter of northeast quarter southeast quarter, and west half of section eight, containing five hundred and twenty acres. West half of section twelve, containing three hundred and twenty acres. All of section fourteen, containing six hundred and forty acres. All of section eighteen, containing six hundred and fifty acres and eighty-eight hundredths of an acre. All of section twenty, containing six hundred and forty acres. All of section twenty-two, containing six hundred and forty acres. All of section twenty-four, containing six hundred and forty acres. North half of northeast quarter, west half of southeast quarter, and west half of section twenty-six, containing four hun-
45 dred an eighty acres. All of section twenty-eight, containing six hundred and forty acres. All of section thirty, containing six hundred and forty-four acres and ninety-six hundredths of an acre. North half of section thirty-two, containing three hundred and twenty acres. Northeast quarter of northeast quarter and west half of northwest quarter of section thirty-four, containing one hundred and twenty acres.

(On the margin in red ink): N.^{2} NW.^{4}, Sec. 2, 26 S., 20 E., reconveyed by the Co. Nov. 27, 1885. F. $\frac{1886}{1958}$. C. S. B.

* * * * * * *

Township twenty-six, range twenty.

Southeast quarter of northeast quarter, north half of northwest quarter, and southeast quarter of section two, containing three hundred and sixty

acres. All of section six, containing six hundred and fifteen acres and thirty-two hundredths of an acre. All of section eight, containing six hundred and forty acres. West half of northwest quarter and southeast quarter of southeast quarter of section ten, containing one hundred and twenty acres. North half of northwest quarter, south half of northwest quarter, southwest quarter, and east half of section twelve, containing six hundred and forty acres. All of section fourteen, containing six hundred and forty acres. All of section eighteen, containing six hundred and four acres and eighty-hundredths of an acre. Northwest quarter of section twenty, containing one hundred and sixty acres. All of section twenty-two, containing six hundred and forty acres. All of section twenty-four, containing six hundred and forty acres. Lots numbered one and two of section twenty-six, containing ninety-eight acres and thirty-two hundredths of an acre. Lots numbered one and two of section twenty-eight, containing one hundred and one acres and twenty-eight hundredths of an acre.

Township twenty-four, range twenty-one.

West half of southwest quarter of section thirty, containing sixty-six acres and ten hundredths of an acre.

Township twenty-five, range twenty-one.

West half of section six, containing two hundred and ninety,
46 acres and fifty-one hundredths of an acre. All of section thirty, containing six hundred and thirty-two acres. Northwest quarter of section thirty-two, containing one hundred and sixty acres.

Township twenty-six, range twenty-one.

East half of northeast quarter, west half of northwest quarter, and south half of section six, containing four hundred and forty-seven acres and four hundredths of an acre; west half of northeast quarter, west half of southeast quarter, and west half of section eighteen, containing four hundred and fifty-eight acres and sixteen hundredths of an acre.

* * * * * * *

Now know ye that the United States of America, in consideration of the premises and pursuant to the said act of Congress, have given and granted, and by these presents do give and grant, unto the said Missouri, Kansas and Texas Railway Company of Kansas, and its assigns, the tracts of land selected as aforesaid and described in the foregoing, yet excluding "all mineral lands," should any such be found to exist in the tracts aforesaid:

To have and to hold the said tracts, with the appurtenances thereof, unto the said Missouri, Kansas and Texas Railway Company of Kansas, and its assigns, forever.

In testimony whereof I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington this third day of November, in the year of our Lord one thousand eight hundred and

seventy-three and of the Independence of the United States the ninety-eighth.

By the President:

[SEAL.]

U. S. GRANT,

47 By S. D. WILLIAMSON,
Secretary.

L. K. LIPPINCOTT,
Recorder of the General Land Office.

(Indorsed): Patent trans. Nov. 5, 1873, to Messrs. Britton & Gray, attys. of company, Washington, D. C. Receipt ack'd Feb'y 17, 1879, in response to our letter of 13 Feb'y, '79, N. 97237.

48 EXHIBIT D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 7th, 188 .

I, S. M. Stockslager, Acting Commissioner of the General Land Office, do hereby certify that the annexed abstract copy of a patent issued to the Missouri, Kansas and Texas Railway Company, March 19th, 1875, is a true and literal exemplification of that portion of the original to which it relates, as recorded in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

S. M. STOCKSLAGER,
Acting Commissioner of General Land Office.

48½ THE UNITED STATES OF AMERICA:

To all whom these presents shall come, greeting:

Whereas by the act of Congress approved July 26, 1866, entitled "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," authority is given to the Union Pacific Railway Company, South Branch, now known as the Missouri, Kansas and Texas Railway Company of Kansas, a corporation existing under the laws of said State, to construct a railroad and telegraph line under certain conditions and stipulations, as expressed in said act; and provision is made for granting to the State of Kansas, for "the use and benefit of said railroad company every alternate section of land or parts thereof, designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile."

And whereas it is further enacted that "in case it shall appear that the United States have, when the line of said road is definitely located, sold any sections or any parts thereof granted as aforesaid, or that the rights of pre-emption or homestead settlement have attached to the same," then so much land is set apart to be selected for the purpose aforesaid nearest to the sections above specified.

Provided, "That said lands hereby granted as indemnity shall not be selected beyond twenty miles from the line of said road."

And whereas it is further enacted by the 3d section of the aforesaid act that "when the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workman-like manner as a first-class railroad, patents shall issue to said company for the lands thereby granted."

And whereas it is indicated by letter of the Secretary of the Interior to the Commissioner of the General Land Office, dated July 25th, 1870, and map therewith, duly certified by the governor of the State of Kansas, that the said Missouri, Kansas and Texas Railway Company has fully completed and equipped, as required by the act, the said railroad from Junction City to the southern boundary of the State of Kansas.

49 And whereas certain tracts have been selected under the act aforesaid by N. S. Goss, acting land commissioner of the Missouri, Kansas and Texas Railway Company, as shown by his original list of selections, dated July 29th, 1874, and certified under same date by the register and receiver at Independence, Kansas; the said tracts being described as follows, to wit:

South of base-line and east of sixth principal meridian, Kansas.

* * * * * * *

* * * North half of northeast quarter of section twenty-eight, in township twenty-three, range nineteen, containing eighty acres. Southeast quarter of southeast quarter of section thirty, in township twenty-three, range nineteen, containing forty acres.

Township twenty-four, range nineteen.

East half of northwest quarter, and east half of section thirty-four, containing four hundred acres.

Township twenty-five, range nineteen.

Southeast quarter of southwest quarter, southwest quarter of southeast quarter, and southwest quarter of southwest quarter of section twelve, containing one hundred and twenty acres.

Township twenty-four, range twenty.

North half of north east quarter of section six, containing eighty acres.

Township twenty-six, range twenty.

* * * South half of northeast quarter, northwest quarter and southeast quarter of section four, containing four hundred and eighty acres.

50 Township twenty-six, range twenty-one.

* * * West half of northeast quarter, west half of southeast quarter, and west half of section eight, containing four hundred and eighty acres; east half of northeast quarter and east half of southeast quarter

of section eighteen, containing one hundred and sixty acres; all of section twenty, containing six hundred and forty acres; lots numbered one and two of section thirty, containing seventy-two acres and eight-hundredths of an acre.

* * * * * * *

Now know ye, that the United States of America in consideration of the premises and pursuant to the said act of Congress, have given and granted, and by these presents do give and grant unto the said "Missouri, Kansas and Texas Railway Company of Kansas" and to its assigns the tracts of land selected as aforesaid and described in the foregoing, yet excluding all "mineral lands" should any such be found to exist in the tracts aforesaid.

To have and to hold the said tracts with the appurtenances thereof, unto the said "Missouri, Kansas and Texas Railway Company of Kansas, and its assigns forever.

In testimony whereof, I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

51 Given under my hand, at the city of Washington, this nineteenth day of March, in the year of our Lord, one thousand eight hundred and seventy-five, and of the independence of the United States the ninety-ninth.

By the President:

U. S. GRANT.

[SEAL.] G. D. WILLIAMSON,
Secretary.

L. K. LIPPINCOTT,
Recorder of the General Land Office.

(Indorsed:) Patent sent March 25th, 1875, to Messrs. Britton, Gray & Drummond, attorneys of co., Washington, D. C. Receipt acknowledged March 29th, 1875. L. 45,384.

52 EXHIBIT D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE;
Washington, D. C., September 7th, 1886.

I, S. M. Stockslager, Acting Commissioner of the General Land Office, do hereby certify that the annexed abstract copy of a patent issued to the Missouri, Kansas and Texas Railway Company August 17th, 1876, is a true and literal exemplification of that portion of the original to which it relates, as recorded in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] S. M. STOCKSLAGER,
Acting Commissioner of General Land Office.

52½ THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, greeting:

No. 12. Whereas by the act of Congress approved July 26th, 1866, entitled "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," authority is given to the Union Pacific Railway Company, South Branch, now known as "The Missouri, Kansas and Texas Railway Company of Kansas," a corporation existing under the laws of said State, to construct a railroad and telegraph line, under certain conditions and stipulations, as expressed in said act, and provision is made for granting to the State of Kansas for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten, sections per mile.

And whereas it is further enacted that in case it shall appear that the United States have, when the line of said road is definitely located, sold any sections or any parts thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, then so much land is set apart, to be selected for the purposes aforesaid nearest to the sections above specified, provided that said lands hereby granted "as indemnity" shall not be selected beyond twenty miles from the line of said road.

And whereas it is further enacted by the 3d section of the aforesaid act that "when the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workman-like manner as a first-class railroad, patents shall issue to said company" for the lands thereby granted.

And whereas it is indicated by letter of the Secretary of the Interior to the Commissioner of the General Land Office, dated July 25th, 1870, and map therewith duly certified by the governor of the State of Kansas, that the said Missouri, Kansas and Texas Railway Company has fully completed and equipped, as required by the act, the said railroad from Junction City to the southern boundary of the State of Kansas.

And whereas certain tracts have been selected under the act
53 aforesaid, by N. S. Goss, land attorney for receiver of the said Missouri, Kansas and Texas Railway Company, as shown by the original lists of selections dated May 10th, 1876, and certified under same date by the register and receiver at Independence, Kansas, the said tracts being described as follows; to wit:

South of base line and east of sixth principal meridian.

* * * * * * *

Even sections, twenty miles limits.

* * * * * * *

Township twenty-three, range nineteen.

Northwest quarter of northeast quarter and northeast quarter of northwest quarter of section twenty-six, containing eighty acres.

Township twenty-four, range nineteen.

Southeast quarter of section four, containing one hundred and sixty acres. East half of northwest quarter of section eight, containing eighty acres.

Township twenty-five, range nineteen.

Northeast quarter of southwest quarter and northwest quarter of southeast quarter of section twelve, containing eighty acres.

* * * * * * *

Now know ye, that the United States of America in consideration of the premises and pursuant to the said act of Congress, have given and granted, and by these presents do give and grant unto the said Missouri, Kansas and Texas Railway Company of Kansas, and its assigns, the tracts of land selected as aforesaid and described in the foregoing, yet excluding "all mineral lands" should any such be found to exist in the tracts aforesaid.

54 To have and to hold the said tracts with the appurtenances thereof, unto the said Missouri, Kansas and Texas Railway Company of Kansas, and to its assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this seventeenth day of August, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first.

By the President:

[SEAL.]

U. S. GRANT.
By D. D. CONE,
Secretary.
S. W. CLARK,
Recorder of the General Land Office.

(Indorsed:) Patent transmitted Aug. 24th, 1876, to Messrs. Britton & Gray, att'ys of said railway co., Washington, D. C. R'c'pt acknowledged Aug. 29th, 1876. Letter M, 23199.

55 EXHIBIT D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 7th, 1886.

I, S. M. Stockslager, Acting Commissioner of the General Land Office, do hereby certify that the annexed abstract copy of a patent issued to the Missouri, Kansas and Texas Railway Company, April 23rd, 1877, is a true and literal exemplification of that portion of the original to which it relates, as recorded in this office.

In testimony whereof I have hereunto subscribed my name and caused

the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] S. M. STOCKSLAGER,
Acting Commissioner of General Land Office.

55½ THE UNITED STATES OF AMERICA,

To all to whom these presents shall come, greeting:

No. 13. Whereas by the act of Congress, approved July 26th, 1866, entitled "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," authority is given to the Union Pacific Railway Company, South Branch, now known as the Missouri, Kansas and Texas Railway Company of Kansas, a corporation existing under the laws of said State, to construct a railroad and telegraph line, under certain conditions and stipulations as expressed in said act, and provision is made for granting to the State of Kansas, for "the use and benefit of said railroad company, every alternate section of land, or parts thereof, designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile."

And whereas it is further enacted that, "in case it shall appear that the United States have, when the line of said road is definitely located, sold any sections, or any parts thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same," then "so much land is set apart, to be selected for the purpose aforesaid, nearest to the sections above specified, provided that said land hereby granted" as indemnity "shal not be selected beyond twenty miles from the line of said road."

And whereas it is further enacted by the 3d section of the aforesaid act that "when the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner, as a first-class railroad, patents shall issue to said company" for the lands thereby granted.

And whereas it is indicated by letter of the Secretary of the Interior to the Commissioner of the General Land Office, dated July 25th,
56 1870, and map therewith, duly certified by the governor of the State of Kansas, that the said Missouri, Kansas and Texas Railway Company has fully completed and equipped, as required by the act, the said railroad from Junction City to the southern boundary of the State of Kansas.

And whereas, certain tracts have been selected under the act aforesaid by N. S. Goss, land attorney of the Missouri, Kansas and Texas Railway Company, as shown by the original lists of selections dated July 12th, November 7th, and December 6th, 1876, and certified under dates of November 1st and 7th, and December 6th, 1876, by the registers and receivers at Concordia, Independence, and Salina, Kansas.

The said tracts being described as follows, to wit: South of base line and east of sixth principal meridian, Kansas. * * * Twenty miles limits, Independence district.

* * * * * * *

Township twenty-three, range nineteen.

Southeast quarter of the northeast quarter of section twenty, containing forty acres.

North half of the northwest quarter of section thirty-four, containing eighty acres.

Township twenty-five, ange rnineteen.

North half of the northwest quarter of section ten, containing eighty acres.

Township twenty-six, range nineteen.

West half of the southwest quarter of section two, containing
57 eighty acres. East half of the southeast quarter of section two, containing eighty acres.

Township twenty-five, range twenty.

East half of the southeast quarter of section twenty-six, containing eighty acres. East half of the southwest quarter of section thirty-four, containing eighty acres.

Township twenty-six, range twenty.

Southwest quarter of the northeast quarter, and southeast quarter of the northwest quarter of section two, containing eighty acres. East half of the southwest quarter of section twenty, containing eighty acres.

* * * * * * *

Now know ye, the *the* United States of America, in consideration of the premises and pursuant to the said act of Congress, have given, and granted, and by these presents do give and grant unto the said Missouri, Kansas and Texas Railway Company of Kansas and its assigns the tracts of land selected as aforesaid and described in the foregoing, yet excluding "all mineral lands" should any such be found to exist in the tracts aforesaid. To have and to hold the said tracts, with the appurtenances thereof, unto the said Missouri, Kansas and Texas Railway Company of Kansas, and to its assigns forever.

In testimony whereof, I, Rutherford B. Hayes, President of the United States, have caused these letters to made patent, and the seal of the
58 General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this twenty-third day of April, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

[SEAL.] R. B. HAYES.

By the President:

By D. D. CONE,

Secretary.

S. W. CLARK,

Recorder of the General Land Office.

(Indorsed:) Patent transmitted April 27, 1877, to Messrs. Britton & Gray, att'ys for company, Washington, D. C. Receipt ack. May 5, 1877. "M" 64,241.

59 EXHIBIT E.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 23, 1887.

I, S. M. Stockslager, acting Commissioner of the General Land Office, do hereby certify that the annexed map is a true copy of so much of the official maps of record in this office as shows a portion of the New York Indian Reserve, in the State of Kansas, and the limits of the grants to the Missouri, Kansas and Texas, the Leavenworth, Lawrence and Galveston, and the Missouri River, Ft. Scott and Gulf R. R. Companies therein.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

S. M. STOCKSLAGER,
Acting Commissioner of General Land Office.

(Here follows map marked p. 59½.)

60 EXHIBIT F.

[Received at Humboldt April 3, 1867.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
March 19, 1867.

REGISTER AND RECEIVER,
Humboldt, Kansas:

GENTLEMEN: Under the act of Congress approved July 26, 1866 (Pamph. Laws, 1866, p. 289), there is granted to Kansas to aid in the construction of a railroad by the "Union Pacific Railroad Company, Southern Branch," from "Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State" every alternate section of land or parts thereof, designated by odd numbers; to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile, and where any of said sections have been reserved, sold, pre-empted, or otherwise disposed of by the United States, then there is to be reserved, "for the purposes aforesaid," "from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated," &c., provided "that said lands hereby granted shall not b selected beyond twenty miles from the line of said road."

The second section of the act increases the price of the even sectio within ten miles on each side of said road to double the minimum pri provided that actual bona fide settlers under the pre-emption laws m upon due proof, &c., purchase the same at the price fixed for said lanc the date of settlement, and provided that homestead settlers may t eighty acres each of such double-minimum lands.

1 In the Circuit of the United States for the District of Kansas.

To the judges of the circuit court of the United States for the district of Kansas:

Your orator, Benjamin Harris Brewster, Attorney General of the United States of America, for and on behalf of the United States of America brings this his bill against the Kansas City, Lawrence and Southern Railroad Company, a corporation organized under the laws of the State of Kansas, and thereupon your orator complains and alleges that on and for a long time prior to the 19th day of May, in the year of our Lord one thousand eight hundred and seventy-three, your orator was the owner and in the exclusive possession of certain lands (hereinafter described), which said lands had been duly surveyed and were public lands of the United States, and as such were subject to purchase by actual settlers, and to homestead and preemption entry under the laws enacted by the Congress of the United States.

Your orator further alleges and shows to the court that, pursuant to the said laws enacted by the Congress of the United States, a large number of actual and *bona fide* settlers went upon said lands, and, having all the qualifications required by said laws, made settlement and lasting and valuable improvements thereon, and now occupy the said lands as their homes, and are entitled, upon payment therefor, to receive patents for the same from your orator.

The lands herein mentioned are described as follows, to wit:

2 Subdivisions.	Sec.	T's.	R'e.
S e, n w, & w s e	13	24	20
S e, n e, & e ½ s e	27	24	20
All	35	24	20
E ½	1	25	20
All	3	25	20
All	13	25	20
All	15	25	20
E ½, n e & e ½ s e ¼	17	25	20
All	21	25	20
All	23	25	20
All	25	25	20
All	27	22	20
E ½ & e ½ s w	29	25	20
All	33	25	20
W ½, n w, s e, & e ½ s e	35	25	20
S ½	19	25	21
W ½	29	25	21
All	31	25	21
All	1	26	20
N ½ s w ¼, w ½ s e & n e s e	3	26	20
All	5	26	20
E ½, n e & e ½ s e	7	26	20
All	9	26	20
All	11	26	20

	Subdivisions.	Sec.	T's.	R'e
	All	13	26	2[illegible]
	All	15	26	20
	All	17	26	20
	E ½ n e & e ½ s e ¼	19	26	20
	E ½ e ½ s w & s w s w	21	26	20
	All	23	26	20
3	Lots 1 & 2	25	26	20
	Lots 1 & 2	27	26	20
	Lots 1 & 2	29	26	20
	W ½	5	26	21
	All	7	26	21
	W ½, n e ¼, w ½, s e ¼, & w ½	17	26	21
	All	19	26	21
	Lots 1 & 2	29	26	21

All of which said lands are situated in the county of Allen and State of Kansas.

But now, so it is, may it please your honors, that the said defendant, combining and confederating with divers persons at present unknown to your orator, whose names when discovered your orator prays he may be at liberty to insert herein, with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orator in the premises, the said defendant denies your orator's interest and title in and to said lands, and denies the right of said *bona fide* settlers to occupy said lands and to perfect their titles by payment to your orator of the purchase price thereof, and denies the right of said settlers to receive patents therefor from your orator upon such payment being made.

And the said defendant sometimes pretends that under a certain act of Congress, approved March 3, 1863, and another act of Congress, approved July 26, 1866, said lands hereinbefore described were granted to aid in the construction of certain railroads, among which the said defendant claims were the Leavenworth, Lawrence and Fort Gibson Railroad, the Atchison, Topeka and Santa Fe Railroad,
4 and the Union Pacific Railroad, Southern Branch; and the defendant claims that, by virtue of said last-mentioned acts of Congress, and a certain act of the Legislature of the State of Kansas, approved February 9th, 1864; a certain other act of the Legislature of the State of Kansas, approved February 23d, 1866; a certain other act of the Legislature of the State of Kansas, approved February 26, 1867, and by virtue of a certain patent hereinafter particularly described, and of certain assignments and conveyances from said Union Pacific Railroad Company, Southern Branch, and said Atchison, Topeka and Santa Fe Railroad Company, and as successor of the said Leavenworth, Lawrence and Fort Gibson Railroad Company, it has become and is the owner of all the lands hereinbefore described, whereas your orator charges the contrary thereof to be the truth; that the defendant is the successor of the said Leavenworth, Lawrence and Fort Gibson Railroad Company, the name of said last-named railroad company having been changed to that of Leaven-

The fourth section requires that the lands granted shall be withdrawn as soon as the company shall file a map of its line of route.

The company having duly filed a line of route in this office, through the Secretary of the Interior, I inclose a diagram of that part coming within the limits of your district, with the ten and twenty mile limits on each side of the road laid down thereon.

You will, upon its receipt, proceed to mark on your plats the limits as thereon designated, and will reserve from sale, location, or entry of any kind, except in case of bona fide pre-emptions initiated prior to withdrawal, all the odd-numbered sections within the ten-mile limits and all the vacant lands between the ten and twenty mile limits.

The even sections within the ten-mile or granted limits you will withdraw from private entry, and the same will only be subject to pre-emption and homestead entry at the rate of $2.50 per acre until regularly offered at public sale, except in cases of bona fide pre-emptions where settlement was made prior to this withdrawal, wherein the party may make proof and pay for the same at $1.25 per acre.

Be pleased to acknowledge the date of receipt of this, from which time the same becomes effective.

Very respectfully,

JOS. S. WILSON, *Commissioner.*

60½ [Received at Humboldt May 10, 1867.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
April 30, 1867.

REGISTER AND RECEIVER,
Humboldt, Kansas:

GENTLEMEN: Under date of March 19, 1863, I transmitted to you a diagram showing the designated line of route, with the ten-mile or granted limits of the Leavenworth, Lawrence & Galveston Railroad, for which a grant of lands is made to Kansas by the act of Congress approved March 3, 1863.

By my letter accompanying the diagram, I ordered, with the approval of the Secretary, that the odd sections within said limits should be withheld from further sale or location, pre-emption or homestead entries, except where inceptive pre-emption rights had attached prior to withdrawal, and directed that the even sections should be held subject to pre-emption and homestead entry at $2.50 per acre.

Herewith I inclose a map of the actual location of the route of said road, with that portion of the ten and twenty mile limits designated by sectional lines as falling within your district. You will now withhold from sale or location, pre-emption or homestead entries, all the odd sections within the limits of twenty miles, as laid down on the accompanying diagram; the even sections within the ten-mile limits being held at $2.50, as under the former withdrawal.

Where settlement may be shown to have been made upon an even section falling without the lines of the ten-mile limits as originally withdrawn, and within the ten-mile limits as shown on the present diagram,

you will allow the party to prove up and pay for the land at the ordinary minimum price, provided said settlement was made prior to the receipt by you of this order of withdrawal; and for your guidance in this matter I have marked on the diagram the line of original withdrawal. Also, where settlement may have been made on an odd-numbered section outside of the ten and within the twenty mile limits prior to the receipt by you of this order of withdrawal, the settler will be protected in his rights by reason of such prior settlement.

Be pleased to acknowledge the date of the receipt of this letter.

Very respectfully, your obedient servant,

JOS. S. WILSON, *Commissioner.*

61 In the circuit court of the United States for the district of Kansas.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY Company et al., defendant.

The demurrer of the Missouri, Kansas and Texas Railway Company to the amended bill of complaint of the United States, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said amended bill of complaint to be true, in such manner and form as the same are therein and thereby set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainant hath not by its said amended bill made such a case as entitles it in a court of equity to any relief from or against this defendant, touching the matters contained in the said amended bill, or any of such matters.

DAVID KELSO,
WILLIAMS & DILLON,
Sol. for Def'ts.

I certify that, in my opinion, the foregoing demurrer of the Missouri, Kansas and Texas Railway Company et al., defendant, to the amended bill of complaint of the United States of America, complainant, is well founded in law, and proper to be filed in the above cause.

H. P. DILLON,
Sol. for Def'ts.

H. P. Dillon, being duly sworn, does depose and say that he has read the foregoing demurrer to the amended bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceeding therein.

H. P. DILLON.

Subscribed and sworn to before me this 23rd day of March, 1888.

[SEAL.] LESTER S. WILSON,
Notary Public.
(Commission expires Jan'y 7, 1891.)

62 (Endorsed :) No. 5784. The United States of America vs. the Missouri, Kansas & Texas Railway Company et al. Demurrer. Filed March 23, 1888. A. S. Thomas, clerk. By Frank H. Holt, deputy.

63 In the circuit court of the United States for the district of Kansas.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY Company et al., defendant.

The demurrer of J. W. Roll, M. H. Moore, W. H. McClure, and of the other defendants named in said amended bill, except the Missouri, Kansas & Texas Railway Company.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said amended bill of complaint to be true, in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto, and for cause of demurrer show that the said complainant hath not by its said amended bill made such a case as entitles it in a court of equity to any relief from or against these defendants touching the matters contained in the said amended bill, or any of such matters.

DAVID KELSO,
WILLIAMS & DILLON,
Sol. for Def'ts.

I certify that, in my opinion, the foregoing demurrer of J. W. Roll, M. H. Moore, W. H. McClure, and other defendants to the amended bill of complaint of the United States of America, complainant, is well founded in law, and proper to be filed in the above cause.

H. P. DILLON,
Sol'r for Def'ts.

H. P. Dillon, being duly sworn, does depose and say that he has read the foregoing demurrer to the amended bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

H. P. DILLON.

64 Subscribed and sworn to before me this 23rd day of March, 1888.
[SEAL.] LESTER S. WILSON,
Notary Public.
(Commission expires Jan'y 7, 1891.)

(Endorsed :) No. 5784. The United States of America vs. The Missouri, Kansas & Texas Railway Company et al. Demurrer. Filed March 23, 1888. A. S. Thomas, clerk. By Frank H. Holt, deputy.

65 In the circuit court of the United States for the district of Kansas.

THE UNITED STATES
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY Company et al.

Opinion.

BREWER, C. J.:

This is a bill filed by the Government to set aside the patent to certain even-numbered sections of land patented to the Missouri, Kansas & Texas Railway Company, the patentee, and certain grantees from it of various sections are made parties defendant. All of them joined in a demurrer to the bill, and the questions are now presented on such demurrer. Some years since the Government filed a similar bill to set aside patents to the same patentee for odd-numbered sections. That case, on final hearing, was submitted to me and decided in favor of the Government (25 Fed. Rep., 243). On an appeal to the Supreme Court the judgment of the circuit court was reversed and the case remanded, with instructions to dismiss the bill. (118 U. S., 682.) The opinion filed in that case by the Supreme Court is earnestly criticised by the learned counsel for appellant, and several pages of their brief are devoted to this criticism. Although such opinion was different from my own, and resulted in the reversal of my judgment, it does not become me to criticise it in the least. On the other hand it is my duty, as a judge of a subordinate court, to loy-

66 ally accept it in all its parts as a correct interpretation of the law. If it be true, as counsel say, that there be errors of fact and of law in it, that court, when its attention is called to the matter, will undoubtedly make the correction; meantime it is my to follow it both in letter and spirit. I premise this because, in my judgment, it avoids the necessity of discussing some of the questions discussed with great elaboration by counsel. I may also add that, in view of the magnitude of the interests involved, there is a certainty that this case will be taken to the Supreme Court for review; hence extended discussion on my part of the questions is unnecessary.

It is insisted in the first place that these lands were not the subject of grant because of the New York Indian Reservation created by the treaty of 1838 (7 U. S. Stat., 550). With respect to that question it is enough to say that if the even-numbered sections were not subject to grant, neither were the odd-numbered sections, and in the case in the 118 U. S., the sixth proposition made by counsel as appears from their brief was the same as is now suggested, and while that question was not in terms discussed by that court, it closes its opinion with these words:

"There are other grounds urged for granting the relief sought by the bill, but they are not sufficient to justify such a decree, nor are they important enough to require further discussion here."

In view of that expression of opinion from the Supreme Court, it is unnecessary if not improper for me to enter into any discussion of the matter.

The second proposition is that the act of March 3, '63, making the

grant in aid of the L., L. & G. Road, expressly reserved these sections to the United States, and the act of July 26, '66, does not
67 repeal the former reservation, but recognizes and re-enacts the same reservation, and also that the act of '66 is not applicable to these lands. It seems to be conceded by the Supreme Court in the opinion referred to that if these acts are to be treated as distinct grants to independent roads an argument kindred to this would have great force; but the judgment of that court was that the acts of '63, '64, & '66 were to be taken and con'trued as in pari materia and with the sole object of building one road. Putting that construction upon these various statutes and regarding them in the same light which the Supreme Court seems to have regarded them, the later acts must be treated as rather supplementary then independent, and construing them in that way the antagonism springing from their reservations disappears. If the later act merely extends or supplements the earlier acts, then they can not be construed as independent grants nor as antagonistic. In that view the effect which has been given to these reserving clauses in other cases ceases to have operating force here, and this proposition must also be overruled. Again it is insisted that the road was not built on the line of the definite location, but deflects in some instances therefrom, and near the city of Humboldt to the distance of two miles and a half, and has been since that time operated on the line as built. Hence by reason of its first failure to construct and its subsequent failure to operate and maintain on the line of definite location it is insisted that the grant never became operative, and the officers of the Land Department exceeded their powers in issuing patents, and that there is a breach of a condition subsequent. It must be noticed that this question does not arise upon an application of the road for patents for these lands, for they were issued in 1873. The Department officers then accepted the road as
68 constructed so nearly upon the line as to comply with the conditions of the grant. Fourteen years thereafter, after the land thus patented has been largely if not entirely sold by the patentee, this bill is filed. It is obvious that the question presents itself under very different aspects now from what it would then. The executive officers of the Government have certain duties of supervision in reference to the execution of grants made by Congress, and when they have acted and their action has been unchallenged for a long series of years, and rights of property have been built up on the faith of their action, a very clear case should be presented before the titles thus resting for years upon that action are disturbed. In the case from the Supreme Court, supra, it observes:

"And, lastly, while we are not indisposed to hold the action of the officers of the Land Department of the Government as absolutely conclusive upon such a subject as this, we see no reason why their deliberate action, with careful attention and all the means of ascertaining what was right, should be set aside in this case."

Again, in the Maxwell land-grant case (121 U. S., 381), the Supreme Court makes these comments:

"We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it can not be done upon a bare preponderance of evidence which leaves

the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul
69 the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof."

These observations of the Supreme Court admonish me that a patent once issued from the General Government is not lightly to be disturbed, and that the perfect title supposed to be conveyed thereby must always be upheld unless it be manifest that there has been in its issue a clear departure from the authority granted. If this be true in respect to a recent patent, much more is it true in reference to a patent so old as this. Parties place faith, and should place faith, in the action of the Government and rely upon the title which its patent conveys; and when, as appears in this case, many parties have purchased in perfect reliance upon the title of the patent, and many years have passed with it unchallenged, common fairness requires that the title thus apparently conveyed should be sustained unless it be very clear that there was a want of authority to issue it. Now, generally, I may observe in this case that the construction of the various acts is not clear. The elaborate briefs prepared by counsel on each side indicate that the matter of construction is a doubtful one. When the officers charged with the primary execution of the duty of construction have discharged that duty and placed a certain construction upon those
70 acts and issued patent in accordance therewith, and that construction has been accepted unchallenged for a long series of years, then the court may well hesitate before it says that that construction was improper and the patent issued without authority. These general considerations are also an excuse for not entering upon a more careful and elaborate discussion of the various questions presented by counsel.

One single matter, however, requires notice, and that is the claim that the patentee received more lands than it was entitled to under this grant; that the lands in controversy were the last selected and patented, and therefore the ones whose title may properly be challenged. In respect to this it may be observed that even if more lands were patented than the company was entitled to, a grave question arises and is discussed by counsel, whether the title should fail to those last selected or to those most remote from the general limits. I do not, however, deem it necessary to enter into a discussion of this question, and for this reason: It is a well known fact that this road for many miles runs through the Osage Indian lands, and that by the decision of the Supreme Court of the United States none of these lands passed under this or any other grant to railroad companies. Now, the act of '66 in making the grant, provides, "but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead, settlement has

attached to the same, or that the same has been reserved to the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above
71 specified, so much land as shall be equal to such lands as the United States have sold reserved, or otherwise appropriated, etc." (14 U. S. Stat. at Large, 289). Now, if the right of selection extended to the quantity of lands sufficient to make up the losses caused by the existence of the Osage Indian Reservation, then I do not understand that the company has received its full grant of lands, and that such is a true construction of this grant seems to be settled by the decision of the Supreme Court in the case of R. R. Co. vs. Barney et al., 113 U. S., 618.

So far as any claim is made in reference to particular tracts upon which a homestead or pre-emption settlement was made before any rights of the railroad company attached is concerned, it is enough to say that equity does not interfere when there is a full and adequate remedy at law, and that these parties can, under the settled practice of Kansas, obtain full protection of their individual rights without the interference of the United States as plaintiff. Furthermore, it may be observed that under the ruling in the United States vs. San Jacinto Tin Co. (125 U. S., 273), it is questionable whether the Government can maintain a bill to set aside a patent in order simply to protect the rights of an individual claimant.

I deem it unnecessary to add more, for reasons heretofore stated. I have not entered into as full a discussion as the importance of the questions would ordinarily demand; but, for the reasons indicated, I think that the demurrer to the bill should be sustained and the bill dismissed, and it is so ordered.

(Indorsed:) No. 5784. The United States vs. The Missouri, Kansas and Texas Railway Company et al. Opinion. Filed Oct. 31, 1888. A. S. Thomas, clerk. By Frank H. Holt, deputy.

72 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of the demurrer of the Missouri, Kansas and Texas Railway Company to the amended bill of complaint of the United States, the demurrer of J. W. Roll, M. H. Moore, W. H. McClure, and of the other defendants, except The Missouri, Kansas and Texas Railway Company to the amended bill of complaint of the United States, and of the decree, and of the opinion filed in said case Oct. 31, 1888, in the suit of the United States of America vs. The Missouri, Kansas and Texas Railway Company et al., No. 5784, in said court. In testimony whereof I hereunto set my hand and affix the seal of said court, at my office in Topeka, in said district of Kansas, this 4th day of December, A. D. 1888.

[SEAL.] GEO. F. SHARITT, *Clerk.*

(Indorsement on cover:) No. 1483. The United States, appellant, vs. The Missouri, Kansas and Texas Railway Company et al. Kansas C. C. U. S. Filed January 11, 1889.

In the Supreme Court of the United States

OCTOBER TERM, 1888.

UNITED STATES, APPELLANT,
vs.
MISSOURI, KANSAS AND TEXAS RAILway Company *et al.* } No. 1483.

MOTION TO ADVANCE THE CASE.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

UNITED STATES, APPELLANT,
vs.
MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *et al.* } No. 1483.

MOTION TO ADVANCE THE CASE.

Comes the United States, by its Attorney General, and moves the court to advance this case upon the docket, that it may be heard at as early a day as convenient, and for reasons therefor states:

That this case was once before passed upon by this court, on November 8, 1886 (see 118 U. S. R., p. 682), and the decision therein was in favor of the appellants and against the Attorney General, representing the Government of the United States. When the case was remanded to the court below the Attorney General filed an amended bill seeking to meet and remove the difficulties that existed against the relief sought for in the original suit. A demurrer was interposed to the amended bill, and the same was heard by the court below and sustained, and such amended bill was dismissed, and from such judg-

ment and decree the Attorney General appealed to this court, and has docketed said appeal, which stands upon the Calendar as No. 1483.

The importance of the case to the Government and many other parties interested, is sufficientiy shown by the case as reported in 118 U. S. R., already cited, and that case was by the Court on February 1, 1886, advanced to be heard on the second day of the October term of 1886, and it was so heard, and when it was advanced it was No. 1147.

In addition to this, the Attorney General has received applications from two hundred and ninety-five citizens and claimants to certain of the lands involved in this suit, to advance the same and have it determined at an early day. The originals of these papers are filed with the Clerk, with this motion, and they are printed as parts of this motion, as Exhibits A. 1, and 2, omitting the signatures of the signers.

Wherefore &c.

A. H. GARLAND,
Attorney General.

EXHIBIT A 1.

PETITION.

To the Honorable
The Attorney General of the United States,
Washington D. C.

Whereas, An action is now pending in the Supreme Court of the United States on appeal from the Circuit Court of the United States in and for the District of Kan-

sas, in which the United States as Plaintiff are seeking to have certain Patents issued to the Missouri Kansas and Texas Railroad Company and all Deeds and Conveyances emanating from such Patents, declared void and canceled as to certain even numbered sections of land in Allen County, Kansas, and

Whereas, The title to said lands has for a long time been in dispute, and are occupied by numerous settlers, who claim to have settled and improved the same under the homestead and preemption laws of the United States and

Whereas, It is for the highest interest to all persons concerned and all Citizens of said County that said suit be determined as soon as possible in the Court of highest resort.

Now therefore the undersigned, resident Citizens of Allen and adjoining Counties of Kansas do hereby petition your Excellency to have, if possible, said cause advanced and brought to trial at the earliest date possible.

And your Petitioners will ever pray.

(Signatures omitted.)

EXHIBIT A 2.

PETITION.

To the Honorable
The Attorney General of the United States,
Washington D. C.

Whereas, An action is now pending in the Supreme Court of the United States on appeal from the Circuit Court of the United States in and for the District of

Kansas, in which the United States as Plaintiff are seeking to have certain Patents issued to the Missouri Kansas and Texas Railroad Company and all Deeds and Conveyances emanating from such Patents, declared void and canceled as to certain even numbered sections of land in Allen County, Kansas and

Whereas, The title to said lands has for a long time been in dispute, and are occupied by numerous settlers, who settled and improved the same under the homestead and preemption laws of the United States and

Whereas, It is for the highest interest to all persons concerned and all Citizens of said County that said suit be determined as soon as possible in the Court of highest resort.

Now therefore the undersigned, resident Citizens of Allen and adjoining Counties of Kansas do hereby petition your Excelleney to have, if possible, said cause advanced and brought to trial at the earliest date possible.

And your Petitioners will ever pray.

(Signatures omitted.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES, APPELLANT,

vs.

THE MISSOURI, KANSAS AND TEXAS RAILWAY CO. ET AL.

No. 317.

Appeal from the Circuit Court of the United States for the District of Kansas.

PETITION FOR REHEARING.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Appellees.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES,
APPELLANT,

v.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY ET AL.

No. 317.

Appeal from the Circuit Court of the United States for the District of Kansas.

PETITION FOR REHEARING.

Now come the appellees by their counsel and respectfully petition for rehearing of so much of the decision of this honorable Court, rendered in the above-entitled cause on October 19, 1891, as holds invalid the patents issued by the United States to the said Railway Company for lands selected as indemnity under its land grant made by the act of Congress of July 26, 1886 (14 Stat. 289, c. 270), so far as same embrace even-numbered sections within the primary or ten-miles limits of the grant made by act of Congress of March 3, 1863 (12 Stat. 772, c. 98), to aid in construction of the Leavenworth, Lawrence and Galveston Railroad.

A. T. BRITTON,
A. B. BROWNE,
Atty's for Appellees.

STATEMENT.

The opinion of the Court herein holding these lands excepted from the grant for the Mo., Kans. & Texas Ry. Co. is based upon two general propositions:

1. That by the earlier grant of 1863, *supra*, the *odd*-numbered sections were given to the grantee thereunder, and the *even*-numbered sections remaining to the United States were thereby set apart for the purposes therein expressed, viz., for sale at the increased or double minimum price at public outcry, or subsequent sale at private entry or under the pre-emption law, and for entry under the general homestead law; and

2. Hence were *reserved* to the United States within the meaning of the following proviso contained in section one of the later grant of 1866, for the Mo., Kans. & Texas Ry. Co., viz:

"*Provided*, That any and all lands heretofore reserved "to the United States by any act of Congress, or in any "other manner by competent authority, for the purpose "of aiding in any object of internal improvement or other "purpose whatever, be, and the same are hereby, reserved "and excepted from the operation of this act, except so "far as it may be found necessary to locate the route of "said road through such reserved lands, in which case "the right of way, two hundred feet in width, is hereby "granted subject to the approval of the President of the "United States."

GROUNDS FOR REHEARING.

I.

1. It is conceded by the opinion that the grant of 1866 to the Mo., Kans. & Texas Co. authorized selection of

indemnity lands within that (indemnity) limit from both odd and even-numbered sections. The language of the granting act is that—

"It shall be the duty of the Secretary of the Interior "to cause to be selected for the purposes aforesaid *from* "*the public lands of the United States nearest to the sec-* "*tions above specified* so much land as shall be equal to "the amount of such lands as the United States have "sold, reserved, or otherwise appropriated, or to which the "right of homestead settlement or pre-emption has attached "as aforesaid." (14 Stat. 289.)

2. In *Newhall* v. *Sanger* (92 U. S. 763), this Court said:

"The words '*public lands*' are habitually used in our "legislation to describe such as are subject to sale or "other disposal under *general* laws."

3. The provision of the grant of 1863 as to disposal of the *even*-numbered sections therein which "shall *remain* "to the United States within ten miles on each side of "said road and branches" *embraced all then existing general laws*, viz:

1st. They were made subject to public sale at the increased double minimum price.

2d. After public offering at such increased price, they were then to remain subject to sale at private entry.

3d. They were made in terms subject to pre-emption entry; and,

4th. They were made in terms subject to free acquisition by settlers under the homestead laws.

These were the "general" modes provided by *then* existing law for disposal of the "public lands."

The *odd*-numbered sections passed under the grant, the *even*, numbered sections necessarily remained to the United States, and in legal effect Congress in terms provided for their disposal as "public lands" under the existing "*gen-*" "*eral*" laws then applicable to the sale and disposal of the public domain. The sole possible exception thereto was with respect to military bounty land warrants, which were locatable only on land subject to private entry. (10 Stats 3. R. S. 2415.)

Millions of acres yet remain *not* subject to private entry (because never offered at public sale) which cannot be thus located, and which are yet undeniably "public lands," because subject to all other forms of disposal under "*gen-*" "*eral*" laws.

4. Hence the proviso found in the grant of 1863, regulating disposal of the even-numbered sections remaining to the United States from *that* grant, was as broad in legal effect as then existing general laws for the disposal of the public domain. Such sections were, therefore, on making of the later grant of 1866 to the appellee, *then* subject to disposal under existing general land laws, and met the description of "the public lands of the United States," wherefrom the grant of 1866 authorized indemnity to be taken.

Therefore the proviso in the 1866 grant for appellee, *supra*, excepting from its operation any lands "*heretofore*" reserved to the United States "for the purpose of aiding "in any object of internal improvement or other purpose "whatever," must find operation elsewhere than upon lands *then* public and *then* subject to disposal as such under general laws as were the even-numbered sections within the primary limits of the 1863 grant.

And this conclusion accords with established rules of statutory construction. The provision making the indemnity grant of 1866 from "the public lands of the United

"States nearest to the sections above specified" is broad, general, and unqualified. The proviso following in that act held to except the lands in suit from its operation is subject to the rule expressed by this Court in *United States* v. *Dickson* (15 Pet. 141, 165), as having

"become consecrated almost as a maxim in the interpre-
"tation of statutes, that where the enacting clause is gen-
"eral in its language and objects, and a proviso is after-
"wards introduced, that proviso is construed strictly and
"takes no case out of the enacting clause which does not
"fall fairly within its terms."

5. Lands thus subject to disposal under all general laws cannot be said to be "reserved" to the United States, and hence the proviso has operation upon other lands not in such category, and must be justly limited thereto.

II.

1. In *Ryan* v. *Central Pacific R.R. Co.* (99 *U. S.*) the land involved fell within the indemnity limits of the railroad grant. At date of the railroad grant (1866) the land was reserved by inclusion within an alleged Mexican grant *sub judice*, and not finally rejected until 1873. In 1874 the Company selected the land, and patent issued to it on March 17, 1875. Ryan contended that by reason of the pending Mexican grant claim the land was excepted from the railroad grant. In overruling that contention this Court said:

"Under this statute, when the road was located and the
"maps were made, the right of the Company to the odd
"sections first named became, *ipso facto*, fixed and abso-
"lute. With respect to the 'lieu lands,' as they are called,
"the right was only a float, and attached to no specific

"tracts until the selection was actually made in the man-
"ner prescribed. * * * * * * *

"Here the land was not a part of the alternate odd sec-
"tions specifically granted. It was not within the limits
"of that territory. There, there was a deficiency.

"It was within the secondary or indemnity territory
"where that deficiency was to be supplied. The Rail-
"road Company had not and could not have any
"claim to it until specially selected, as it was, for that
"purpose. It was taken to help satisfy the grant to the
"extent that the odd sections originally given failed to
"meet its requirements. When so selected there was no
"Mexican or other claim impending over it. It had ceased
"to be *sub judice* and was no longer in litigation. It was
"as much '*public land*' as any other part of the public do-
"main. The patent gave the same title to the appellee
"that a like patent for any other public land would have
"given to any other party. The Mexican claim, when con-
"demned, lost its vitality. From that time, as regards the
"future, it ceased to be a factor to be considered, and was
"in all respects as if it had never existed. In this state
"of things the appellee acquired its title, and that title is
"indefeasible."

2. Subsequent decisions of this Court hold that the Rail-road grantee's right does not vest in indemnity lands until the selection is made and *accepted* by the Secretary of the Interior.

Sioux City R.R. v. *Chicago &c., Ry.*, 117 U. S. 406, 408.

Price County v. *Railroad Co.*, 133 *Ibid.* 496, 511.

3. Such acceptance is evidenced by the patents, which in present case (as the opinion recites) were issued to appellee on

November 3, 1873.
March 19, 1875.
August 17, 1876.
April 23, 1877.

At the earliest of these dates, what was the *status* of these even-numbered sections within the primary limits of the 1863 grant, and to what forms of disposal were they subject?

As shown *supra*, they were subjected to sale at public offering; at subsequent private entry; by pre-emption and by free homestead entry by *the express language of the Act of* 1863, and that these modes were all the "general" modes whereby the public lands were *then* disposed of.

The next "*general*" law was the Timber Culture Act of March 3, 1873 (Revised Statutes, 2464–2468), which provided that—

"Every person who plants, protects, and keeps in a "healthy growing condition, for ten years, forty acres of "timber, the trees thereon not being more than twelve "feet apart each way, on any quarter section of any of the "public lands, shall be entitled to a patent for the whole "of such quarter section at the expiration of ten years, "on making proof of such fact by not less than two cred-"ible witnesses: *Provided*, That only one quarter in any "section shall be thus granted."

In the official instructions given under this Timber Culture Act (Copp's Public Land Laws, Ed. 1875, p. 190, par. 15) the direction is:

"No distinction is made as to area or the amount of fee "and commissions between minimum and double mini-"mum lands; *a party may enter* 160 *acres of either*, on "payment of the prescribed fee and commissions."

By paragraph 14 the fees are stated as $10, and commissions $4, whilst sale of 160 acres at double minimum ($2.50) per acre would yield $400.

Hence at date of acceptance of appellee's first selection *every* general law for disposal of the public lands was

operative upon the even-numbered sections remaining to the United States in the primary limits of the 1863 grant. They met the *exact* definition of the term "public lands" as given by the Court in *Newhall* v. *Sanger*, *supra*, and being such at date of appellee's accepted selection, they were subject thereto under the clear doctrine of *Ryan* v. *Railroad Co.*, *supra*.

4. Such, also, has been the Executive construction under *special* Acts. For illustration:

The Act of Congress of April 5, 1872 (17 Stats. p. 649), authorized issue of "Valentine Scrip" to be locatable upon "the unoccupied and *unappropriated* public lands "of the United States, not mineral, and in tracts not less "than the subdivisions provided for in the United States "land laws, and, if unsurveyed when taken, to conform, "when surveyed, to the general system of United States "land surveys."

The departmental instructions thereunder (Copp's Land Laws, Ed. 1875, p. 806) are in language as broad as the statute.

The grant for the Northern Pacific R.R. Co. (July 2, 1864, 13 Stats. p. 365, sec. 6) extends the pre-emption and homestead laws to the even-numbered sections therein, adding: "And the reserved alternate sections shall not be "sold by the Government at a price less than $2.50 per "acre, *when offered for sale*."

Yet, in *Townsite of Seattle* v. *Valentine et al.* (6 Copp's Land Owner, p. 136), the Secretary ruled as to land sought to be located within the Northern Pacific grant with this scrip:

"The application of Mr. Valentine to locate Valentine "scrip E. 301 on the unoccupied and unappropriated "tract outside of the corporate limits of the city is "granted."

The location thus recognized was on part of section 8—an even-numbered double-minimum section—and the odd sections had been withdrawn for the Northern Pacific grant and increase in price thereby effected, years before this Valentine scrip location was made.

5. The same principle was affirmed as early as 1835 by Attorney-General Butler. By Act of May 24, 1828 (4 Stats. 305), Congress granted alternate sections of land to Ohio to aid in extending the Maumee Canal, "reserving "each alternate section of the land unsold to the United "States, * * * and which land so reserved to the "United States shall not be sold for less than $2.50 per "acre."

By Act of June 19, 1834 (4 Stats. 679), the President was authorized to reserve from sale "out of any public "lands that may have been heretofore offered at public "sale and that remain unsold in the State of Ohio a "quantity of land, which together with the lands hereto-"fore granted for the support of schools in the Connecti-"cut Western Reserve in said State, shall be equal to one "thirty-sixth part of said "Western Reserve. * * * "

Thereunder Attorney-General Butler held that the alternate reserved sections on the Maumee Canal were subject to be taken under the school grant, observing:

"The lands reserved by the Act of 24th of May, 1828, "are certainly '*public lands*' within the meaning of the "Act of 1834, and if they have been heretofore 'offered at "'*public sale*' and '*remained unsold*,' it appears to me that "the President may select from them equally with any "other lands of the like description in the State of Ohio."
Laws, Instructions, and Opinions, Part II, p. 196.

A few days later he reaffirmed this opinion, adding:

"I do not perceive that we have any right to amend the

" law by inserting the additional limitation that they shall " also have been subject to entry or sale at the *minimum* " *price*. It might have been highly proper to insert such " a provision, but of this Congress was the exclusive judge. " It appears to me that we must take the law as we find it, " and that, as the words are clear and explicit, there is no " room for interpretation, and to my apprehension scarcely " any for reasonable doubt as to the legal effect of the " enactment."

Ibid, p. 197.

So in present case, the grant of 1866 required the indemnity lands to be selected by the Secretary of the Interior " *from the public lands of the United States nearest to* " *the sections above specified*." *This was done*. The lands were public and subject to disposal under general laws at the time of approved selection, thus meeting the condition of *quality* as expressed in *Newhall* v. *Sanger*, *supra*, and condition for selection as expressed in *Ryan* v. *Railroad Co.*, *supra*.

6. Full recital of all general and special legislation whereunder double minimum lands have been from time to time disposed of by location of scrip; by selection in satisfaction of educational and other grants to the States for like public purposes; for sale under the Desert Land Law, extension of additional homestead rights, etc., would extend the statement beyond proper bounds in a petition of this nature. It is sufficient to state our understanding that executive administration of the general body of the land laws has proceeded for many years in harmony with foregoing illustrations.

III.

1. The opinion holds that it was the policy of Congress to withhold the sections remaining to the United States

within these railroads grants for sale at the increased price, in order to reimburse the Government for the lands thus granted, or for disposal in the special modes therein prescribed.

But historical review of legislation, we submit with great respect, does not support this conclusion as applicable to the present case.

The general pre-emption act of September 4, 1841 (5 Stats. p. 455), by section 10, in naming classes of lands excluded therefrom (*inter alia*), extends the inhibition to "no sections of land reserved to the United States alter-"nate to other sections granted to any of the States for the "construction of any canal, railroad, or other public im-"provement."

Yet by act of August 2, 1852 (10 Stats. p. 27), all pre-emption settlers on the land remaining to the United States within the *first* railroad grant of September 20, 1850 (9 Stats. p. 466), at the date of such grant, were given the right "to purchase, at the price established by law in reg-"ulating the sales of said land," not exceeding 160 acres, upon making proof and payment "before the actual offer-"ing of the tract at public sale."

Again, by Act of March 3, 1853 (10 Stats. p. 244), the pre-emption laws were extended "over the alternate reserved "sections of public lands along the lines of all the rail-"roads in the United States wherever public lands have "been or may be granted by acts of Congress," with the "proviso, "that the price to be paid shall in all cases be "$2.50 per acre, or such other *minimum* price as is now "fixed by law, or may be fixed upon lands hereafter "granted."

And the Act of March 27, 1854 (10 Stats. p. 269; Revised Statutes, 2281), provided:

"That every settler on public lands which have been "or may be withdrawn from market in consequence of "proposed railroads, and who had settled thereupon prior "to such withdrawal, shall be entitled to pre-emption at "*the ordinary minimum* to the lands settled on and culti- "vated by them, *Provided:* They shall prove up their "rights according to such rules and regulations as may be "prescribed by the Secretary of the Interior and pay for "the same before the day that may be fixed by the Presi- "dent's proclamation for the restoration of said lands to "market."

By these laws the United States not only waived the opportunity for sale at public offering *above* the double minimum of $2.50 per acre, but gave by the Act last cited the pre-emptor the right to purchase at "the ordinary "minimum," or $1.25 per acre.

2. And yet the pre-emption settler had no *right* which he could enforce against the United States until actual proof and payment, and until then the United States could otherwise dispose of his land, or alter conditions of price with respect thereto.

Frisbie v. *Whitney*, 9 *Wall.* 187.
Yosemite Valley Case, 15 *Ib.* 77.

3. Later legislation of the same character, entirely destroying the theory of *sale* of alternate sections, is given on pages 37–40 of our brief now before the Court, to which we respectfully invite attention to avoid repetition here.

4. The proviso found in the first railroad grant of 1850, excluding from its operation lands reserved to the United States alternate to those granted by an earlier act for canal purposes, and the *general* proviso found in later railroad grants based thereon, operated to reserve such alternate remaining sections from *all* forms of disposal, except by subsequent public offering at the increased

price. But as the grant of 1863 here involved *changed* the prior legislative policy in this regard by subjecting such alternate remaining sections also to disposal to pre-emptors and to free homestead entry, and in effect made the land subject to *all* then existing general laws, such change of legislative policy necessarily changed the legal *status* of the lands remaining in the 1863 grant, and made them "public" in the full sense contemplated by the language used in *Newall* v. *Sanger*, *supra*. Thereunder the later Timber Culture Law and Special Scrip Acts are given by executive construction full operation therein.

IV.

1. The sections of public land alternate to those granted to aid in construction of railroads are not *reserved* in the sense intended by the proviso to the appellees' grant of 1866, quoted *supra*. They are sections "which by such "grant shall REMAIN to the United States" therein, according to the expressed formula of such grants. They are reserved from the grant as made to the State or Company, and "remain" to the United States for disposal according to law. When the statute directing such disposal makes them (as here) subject to such disposal under all existing *general* laws, it is respectfully submitted that whilst reserved *out* of the grant as made, they are not reserved in any other sense, or for any other purpose.

In this connection we cite from the opinion herein (p 6) as follows:

"The manifest object of the general proviso was to "exclude from the particular grant all lands previously "reserved to the United States for any specific object "whatever, and thereby enable the Government to accom-"plish those objects without confusion or conflict in the

"administration of the public domain, and thus keep "faith with those to or for whose benefit prior grants "were made."

But with great respect we submit—

1st. No confusion or conflict could arise and no injury could result to the prior grantee under the act of 1863. That grant took *only* the odd-numbered sections. The grantee thereunder had no interest in the *even*-numbered sections which remained to the United States, and could be in no manner prejudiced by their subsequent disposal.

2d. Such even-numbered sections were subject to disposal by Congress in its sovereign pleasure. Being made subject to disposal by the terms of the 1863 grant under all then existing general laws, viz., for public sale, private entry, pre-emption, and homestead, they *therefore* met the general description of public lands wherefrom indemnity selection was required to be made under appellee's grant of 1866.

2. These lands became also subject to later general laws as cited *supra;* to location by scrip, &c., and when approved to the appellee by the Secretary of the Interior, there was nothing to distinguish them from other public lands except only the matter of price. But the direction for selection under the appellee's grant makes no reference to price. The sole description and limitation is "*from the* "*public lands of the United States nearest to the sections* "*above specified*," &c.

Under precisely similar conditions Attorney-General Butler said in the Ohio case cited, *supra:*

"I do not perceive that we have any right to amend the "law by inserting the additional limitation that they shall "also have been subject to entry or sale at the *minimum* "*price*."

And fair construction of the *proviso* found in the 1866 grant for appellee cannot impose such "additional limita-" tion."

United States v. *Dickson*, *supra*.

The foregoing statement of points and authorities is made thus full, solely with desire to make clear to the Court the grounds on which the petition for rehearing is based. In submitting for the first time a petition of this nature to this Honorable Court, we do so with the utmost respect; and to conform to the requirement of Rule 30, we fully certify our belief that the grounds assigned therefor are meritorious and well founded in law.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Appellees.

Office Supreme Court U. S.
FILED.
FEB 27 1891
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 733.

THE UNITED STATES,
Appellants,
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *et alios.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

WM. A. MAURY,
Assistant Attorney-General.

Act of 1866 — Cong Globe 1st Sess 39 Congress 3050 3

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STATEMENT OF THE CASE.

This suit is brought for the purpose of removing a cloud upon the title of the United States to certain lands in the southeastern part of the State of Kansas caused by the unauthorized action of the Land Department of the Government in issuing patents intended to convey the said lands to the Missouri Kansas and Texas Railroad Company, in supposed conformity to the act of Congress of July 26, 1866 (14 Stat. 389).

The difficulty out of which this litigation grows is due to the fact that two land-grant railroads of Kansas, The

Missouri Kansas and Texas, the defendant, and the Leavenworth, Lawrence and Galveston, were constructed on converging and intersecting lines. As a consequence, the granted and indemnity limits of these roads overlapped at the point of intersection and more or less, for a given distance, above and below that point.

In Allen County, Kans., various indemnity selections for the benefit of the Missouri, Kansas and Texas Company were made, within its overlapping indemnity limits, from even-numbered sections lying within both the granted and indemnity limits of the Leavenworth, Lawrence and Galveston Company under the mistaken view that these even-numbered sections were of the description of Government lands from which indemnity selections could be lawfully made under the act of July 26, 1866, the only law which could be supposed to authorize selections of even-numbered sections to supply deficiencies within the granted limits of the Missouri, Kansas and Texas Company.

The question of the validity of the patents covering these indemnity selections was carefully and ably discussed by the Secretary of the Interior, in his communication of June 16, 1886, to the Attorney-General requesting that a suit should be brought for the cancellation of these patents (4 Land Decisions, 573); and it was in obedience to that request that this bill was filed.

As the legislation under which this case arises is the same as was before this court in the case of *Kansas City, Lawrence and South Kansas Railroad Company* v. *The Attorney-General* (118 U. S., 682), it is proper to state that

the subject-matter involved here is different from that involved in the former suit, and is not controlled by the reasoning of the court in that case, as will be fully explained further on.

A brief survey of the legislation involved is necessary, at this point, to enable the court to understand the case made in the bill.

By the act of March 3, 1863 (12 Stat., 772) Congress made a grant of lands to the State of Kansas for the purpose of aiding in the construction of a railroad and telegraph from Leavenworth by way of Lawrence and the Ohio City crossing of the Osage River to the southern line of the State in the direction of Galveston Bay, Texas, with a branch road to run from Lawrence along the Wakarusa River to the point where the Atchison, Topeka and Santa Fé Railroad intersects the Neosho River. Another object of the statute was to aid in the construction of a railroad from Atchison, via Topeka, to the western line of the State, in the direction of Fort Union and Santa Fé, with a branch from the Neosho crossing of this projected road down that river to the point where the projected Leavenworth road enters the Neosho Valley. The grant embraces alternate odd-numbered sections for ten sections in width "on each side of said roads and each of its branches," with the usual privilege of supplying deficiencies of the lands in place by selections from any sections designated by odd numbers and lying not more than 20 miles from the lines of said roads and branches.

The State of Kansas accepted this grant by an act approved February 9, 1864, and agreed to give the lands

constructed according to law on its line of definite location. (Par. IV, pp. 4, 5).

2 That the above-mentioned assignment by the Atchison, Topeka and Santa Fé Company to the Union Pacific Railway, Southern Branch, was beyond the competency of the assigning company, and was never ratified by the legislature of Kansas in a valid manner, and that the Missouri, Kansas and Texas Company was not entitled to the benefits of the land-grant act of July 1, 1864 (*supra*) and that the indemnity selections covered by the patents in question were made and the patents issued under the mistaken belief that the State of Kansas had accepted the said grant, whereas it had not (Par. V. pp. 5, 6).

3. That, as has been already stated above, the lands selected and patented to the defendant company were taken from even-numbered sections lying partly within the granted and partly within the indemnity limits of the Leavenworth, Lawrence and Galveston Company, and that these even-numbered sections were expressly reserved from the operation of the act of July 26, 1866, the only act under which the defendant company could have had a pretence to claim even sections (Par. VII, pp. 7, 8.)

4. That the defendant company could not claim under the act of July 26, 1866, any lands lying between the point where the Atchison, Topeka and Santa Fé road crosses the Neosho River and the point where the road of the defendant company crosses the Leavenworth, Lawrence and Galveston road. (Par. VIII, pp. 7, 8.)

5. That before the act of July 26, 1866, or before the said selections of indemnity land were made by the Secretary of the Interior, a large number of persons actually and in good faith settled on the said lands in Allen County in said State, with a view to securing homestead or preemption rights thereto; that sundry of said settlers claim to have done all that was required by law to be done by them to enable them to secure said rights and become entitled to patents for the said land; that settlers have been continuously, exclusively, and uninterruptedly in possession of said land, as the defendant company and all persons claiming under it well knew; that on April 3, 1867, numerous tracts of the said lands were by order of the Commissioner of the General Land Office withheld from sale, location, and entry in violation of law, so that said settlers could not perfect their rights in so far as perfecting the same depended upon the official acts of the register and receivers of the proper land district (Par. IX, pp. 8, 9, 10).

6. The bill then proceeds to state that the defendant company has received a large quantity of land over and above what it has legitimately earned under the said land grants; that for 40 miles of its course it passes through the granted and indemnity limits of the Atchison, Topeka and Santa Fé and the Leavenworth, Lawrence and Galveston roads and, also, for a distance of 29 miles, passes through the Osage Indian lands which had been reserved to the said Indians when the said land grants went into effect; that the defendant company never did construct a road to the south line of the State of Kan-

sas, as the law required, but only to the town of Parsons in Labette County, and that, therefore, the defendant company was never entitled to any indemnity land and that the indemnity selections aforesaid made for and patented to said company were unauthorized and void (Par X, pp. 10-13).

7. The bill further states that the lands in question lie within the New York Indian Reservation, and that the Indian title in said lands has never been extinguished, so that for that reason, alone, the said indemnity selections were null and void (Par. XI, pp. 13, 14).

The prayer of the bill is as already indicated.

DEMURRERS.

The defendants demurred to the bill (pp. 34, 35).

DECREE.

The demurrers were sustained by the court and a decree entered dismissing the bill; and, at the same time, allowing this appeal (p. 1.).

ASSIGMENT OF ERROR.

It is conceived that the decree is erroneous, in this, that it sustained, instead of overruling, the demurrers.

ARGUMENT.

INVALIDITY OF THE INDEMNITY SELECTIONS.

As we have seen, the Secretary of the Interior requested the Attorney-General to bring this suit on the ground, supported by elaborate argument, that the patents in ques-

tion here were issued in violation of law because they purport to convey to the defendant company lands which had been *expressly withheld by Congress* from the operation of the grants for the benefit of that company.

It will be remembered, that these patents cover lands located in that part of Allen County, Kans., where the Missouri, Kansas and Texas road approaches, closely, the Leavenworth, Lawrence and Galveston road, and where the indemnity limits of the former overlap *both the granted and indemnity limits* of the latter.

The lands called for by the patents represent selections from *even-numbered sections* lying within the granted and indemnity limits of the Leavenworth, Lawrence and Galveston road to indemnify the Missouri, Kansas and Texas Company for deficiencies within its granted limits.

Authority to make selections from even-numbered sections, thus situated, is not to be found, we apprehend, in the acts of Congress under which the Missouri, Kansas and Texas road was built, and which this court has said (118 U. S., 682) are to be taken as *one* act so far, at least, as building the road from Fort Riley down the Neosho Valley is concerned.

There can be no possible question about the acts of March 3, 1863, and July 1, 1864, because they expressly confine the lands granted, whether in place or as indemnity, to odd-numbered sections.

The act of July 26, 1866, requires a more particular examination. Like its predecessors, just referred to, it confines the lands granted in place to odd sections, but

when it provides for indemnity selections to supply deficiencies in the lands in place it declares that

> It shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, *from the public lands of the United States* nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, etc.

If there were nothing in this statute to qualify its grant of the right to make indemnity selections "from the public lands of the United States nearest to the sections above specified, etc.," it might, possibly, have been urged, with more or less plausibility, that the selections made in this case from even-numbered sections had the express authority of Congress.

But Congress placed an important limitation on the scope of the grant by adding to it the *proviso* (section 1), already quoted, namely:

> That any and all lands heretofore *reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement* or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, etc.

It was upon the authority of this *proviso* that the Secretary of the Interior held that there was no warrant of law for selecting indemnity lands from the even sections within the overlapped granted and indemnity limits of the Leavenworth, Lawrence and Galveston road. By the express terms of the act of March 3, 1863 (section 1), the grant to the Leavenworth, Lawrence and Galveston road was confined to the odd sections. But the even sections, for 20 miles on each side of the road (section 2), remained to the United States, and those of them lying within the granted limits the statute declared should not be sold at less than the double minimum price, but there is no such

provision as to the even sections situate within the indemnity limits of the road. In a subsequent part of section 2, the even sections within the granted limits are referred to as "*said reserved sections.*"

The Secretary found no ground for making a distinction between the two classes of even sections because the statute declared that those of one class should be sold at double the minimum price, but held that *both classes* were withdrawn from the operation of the act of July 26, 1866, as being lands *reserved* to the United States by the act of March 3, 1863.

That this *proviso* of the act of July 26, 1866, was meant by Congress to withhold from the operation of the act all lands remaining to the United States within the limits of any previous railroad grant is clearly shown by the history which the Secretary gives of the *proviso*, which is, substantially, the same *formula* as was originally devised for the purpose of protecting the alternate sections of land remaining to the United States by virtue of the land-grant of March 2, 1827, (4 Stat., 234), to the State of Illinois to aid in the construction of a certain canal, from the operation of a subsequent railroad land grant of September 20, 1850, overlapping the first grant. The sections remaining to the United States under the first grant were not required to be sold at a different price from other public lands, as in this case, nor was any other discrimination made in their favor, yet Congress considered that they were protected by the proviso which withheld from the operation of the railroad grant "any and all lands RESERVED to the United States" by the canal grant (4 Land Decisions, 573, 575).

The proviso used by Congress in the land-grant act of September 20, 1850 (9 Stat., 466), is in these words:

> *And provided further*, That any and all lands RESERVED to the United States by the act entitled "An act to grant a quantity of land to the State of Illinois, for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan," approved March second, eighteen hundred and twenty-seven, be, and the same are hereby, reserved to the United States from the operation of this act.

Now, when we compare this *proviso* with those used in subsequent land-grant acts we find the difference between the latter and the former to consist in the particular that the *proviso* in the act of 1850 is *special*, while the *provisos* in the other acts are made *general*, so as to protect lands reserved to the Government in any previous land grants or in any other manner. When these land grants began to multiply it became necessary to make the *provisos* thus sweeping and general to protect the Government interests.

Reverting to the language of the *proviso* in the act of September 20, 1850, it will be perceived that there does not appear to be any possible way of escaping the conclusion that Congress considered that the alternate sections remaining to the United States under the canal land grant of March 2, 1827, were lands *reserved* from the operation of that grant.

It is difficult to see what other sense the language of this *proviso* in the land-grant acts can have, for if lands lying within the furthest limits of a grant which remain to the United States are not lands "*reserved*" to the United States "by an act of Congress * * * for the purpose of aiding in any object of internal improvement," *what other lands* could Congress have had in contemplation?

It is true, the Leavenworth, Lawrence and Galveston Company did not fully perform the conditions of its grant, and consequently failed to entitle itself to any indemnity lands, but the argument in favor of the validity of the so-called indemnity selections made for the benefit of the Missouri, Kansas and Texas Company within the overlapped indemnity limits of the Leavenworth, Lawrence and Galveston road derives no support from this default of the latter company, because the act of March 3, 1863, reserving to the United States the even sections within the indemnity limits of that company, remained in full operation until Congress, by the act of July 24, 1876 (19 Stat., 101), declared the said unearned lands forfeited and restored to the public domain "subject to entry only, under the provisions of the homestead laws of the United States" (Schulenberg *et al.*, v. Harriman, 21 Wall., 44).

The bill shows that most of the indemnity selections in question were made prior to the date of the act declaring the forfeiture (p. 8, par. 9).

THE ACT OF JULY 26, 1866, GAVE NO AUTHORITY TO SELECT EVEN-NUMBERED SECTIONS.

The claim that the act of July 26, 1866, authorized the Missouri, Kansas and Texas Company to make indemnity selections from even-numbered sections is based entirely on the declaration in the first section, that indemnity selections should be made "from *the public lands* of the United States nearest, etc."

The important question at once arises, whether the language just quoted is sufficient to authorize this court to

say that it indicates a purpose on the part of Congress to abandon its time-honored policy in making land grants of reserving alternate sections, within the limits of the grant, to the United States for the double purpose of enabling the latter to participate in the benefits to result from the grant and to prevent the lands granted from falling to the beneficiary of the grant in large blocks to the disadvantage of small purchasers in search of homes, and to the obstruction of the settlement of the country.

In the former case (118 U. S., 682) this court held that the acts of March 3, 1863, July 1, 1864, and July 26, 1866, were all to be construed together as one act in so far as the road down the Neosho Valley was concerned.

The first two acts expressly confine the grants made to *odd* sections and reserve the even ones to the United States. But the act of 1866, while it confines the grant of lands in place to odd sections, declares that deficiencies in the lands in place may be supplied "from the public lands of the United States nearest to the sections above specified," provided that selections for that purpose shall be confined within 20 miles from the line of the road.

As this court has said that the act of 1866 was, as to the Neosho Valley road, merely supplemental to the other acts, it is reasonable to suppose that Congress meant by "public lands" the odd sections, which the previous acts had declared should be resorted to for indemnity purposes.

There was no imaginable necessity for extending the grant for indemnity purposes to even sections, because the odd sections dedicated to the road by the previous

acts of 1863 and 1864 *had not yet been touched*, and it has never been suggested, so far as we know, that there was a probability of any such demand on the indemnity limits as to make it doubtful whether the odd sections within those limits would suffice to make up for deficiencies in the lands in place.

If, then, the words "public lands of the United States" in the act of 1866 are held to embrace even sections as well as odd, it would seem that Congress has disregarded a long established policy without an assignable reason. This is not at all likely; indeed it is so unlikely that it would seem proper to refuse to infer such a purpose from words so inadequate to convey it. This is frequently done in construing several statutes, *in pari materiâ*, which are to be taken together and read as one law (United States *v* Freeman, 3 How., 564, and 118 U. S., 682), and we find instances in the books where words used in a later statute are restricted in their sense so as to harmonize with previous statutes on the same subject. An instructive example of this is to be found in *Regina* v. *Buttle* (L. R.; 1. C. C. R., 248).

In that case the act of 15 and 16 Vict., c. 57, provided that answers given by a witness before commissioners inquiring into corrupt practices at elections should not be admissible as evidence against him in any civil or criminal proceeding "except in cases of indictment for perjury *committed in such answers*," but a subsequent statute on the same subject provided that answers so given should be inadmissible as evidence against him in any proceeding "*except in cases of indictment for perjury.*"

The prisoner was indicted for perjury at the trial of an

election petition before Blackburn, J., and the question was whether the words in the latter act were to be taken in their general sense or as qualified in the earlier statute by the words "*committed in such answers*," and the court held that they must be taken with the qualification of the previous statute. Mr. Justice Blackburn said:

> When the legislature changed the words of an enactment no doubt it must be taken prima facie that there was an intention to change the meaning of the enactment. *This, however, is not necessarily so.* Here the omission may have been because there was a wish to change the law, or because the omitted words were thought to be superfluous. I can not believe that there was a wish to change the law, and I therefore think that the evidence was not admissible (p. 252).

And another judge (Martin, B.) said:

> We can not assume that this protection is taken away unless the legislature *clearly says so;* and as the statute (26 Vict., c. 29, s. 7) *does not clearly say so* I think the protection is not taken away, and the evidence, therefore, was not admissible (p. 251).

In Childers *v.* Johnson (6 La. Ann., 634) the court say:

> It is a sound rule of interpretation, in construing an article of the code with reference to a subject-matter, *to take into view the general system* of legislation upon the subject-matter contained in the same work; and where a provision of the code is invoked in derogation of the common rule regulating the subject-matter, *the intention so to derogate should be clear and beyond reasonable doubt* (p. 638).
>
> So here, in construing the words "*public lands*" we must take into view the general land-grant system.

(See, also, Hardcastle, Stat. 66, 67; Strode *v.* Stafford Justices, 1 Brock, 162; Murdock *v* Memphis, 20 Wall., 590; United States *v.* Jones, 131 U. S., 1.)

But it has been said that unless the words "*public lands*" be held to include *even* sections the act of 1866 is left without any object whatever, when taken as supplemental to the other two statutes. But this is clearly not so, because, as the court held in the former case (118 U. S., 682, 692), the act of 1866 was necessary to remove doubts as to the validity of the assignment by the Atchison, Topeka and Santa Fé Company to the Union Pacific Company—South Branch of its interest in so much of the land grant

of the act of 1863 as related to the projected road down the Neosho Valley.

There was room for very grave doubt as to the power of the assigning company and the State of Kansas together to effect what seemed like a diversion of the original grant as made by Congress. It is apparent, therefore, that the object accomplished by the act of 1866 was *vital* to the success of the project of having the road from Fort Riley down the Neosho Valley built by one corporation, and that that must have been the principal object of the statute. There is absolutely nothing, then, in the point that the act of 1866 was without an object if it did not make even sections available for indemnity purposes.

In view, now, of these several considerations, it would seem to be extremely doubtful, to say the very least, whether Congress intended to give the Missouri, Kansas and Texas Company the right to make indemnity selections from both odd and even sections. But a doubt as to the extent of the terms of a grant from the United States must be resolved against the grantee upon the well-known principle, so often recognized by this court, that "all grants of this description are strictly construed against the grantees; *nothing passes but what is conveyed in clear and explicit language.*" (Dubuque and Pacific Railroad *v.* Litchfield, 23 How., 66, 88; Leavenworth, etc., Railroad Company *v.* United States, 92 U. S., 733, 740; Slidell *v.* Grandjean, 111 U. S., 412, 437; Charles River Bridge *v.* Warren Bridge, 11 Pet., 420; Providence Bank *v.* Billings, 4 Pet., 514; Jackson *v.* Lamphire, 3 Pet., 289); United States *v.* Chase, 135 U. S., 255.

Applying this principle to the act of 1866, it follows that the even sections reserved to the United States by the acts of 1863 and 1864 within the indemnity limits which afterwards fell to the Missouri, Kansas and Texas Company, remained to the United States notwithstanding the act of 1866, that being the sense of the law, which at once protects the public interests and harmonizes the several statutes.

It remains now to add a few words on the subject of

THE FORMER SUIT.

The former suit has nothing in common with this one, because it proceeded on the theory that the acts of 1863, 1864, and 1866 were distinct, independent grants, and, consequently, that, as the road contemplated by the act of 1866 was built within the limits of the order of the General Land Office of March 19, 1863, withdrawing from entry the lands lying along the probable lines on which the roads and branch roads mentioned in the act of 1863 would be built, such lands were not included in, but expressly excluded from, the operation of the act of 1866, as lands reserved by competent authority for the purpose of aiding in an object of internal improvement.

But this court held that such was not the correct view, and as has been stated, that the three acts of 1863, 1864, and 1866 were to be taken *in pari materiâ* and read together as one law.

That suit involved the validity of patents to the Missouri, Kansas and Texas Company for odd sections which, it was contended, had been granted by the previous

acts to other companies, but this suit involves the validity of patents to that company for even sections in Allen County lying within its overlapping indemnity limits, which, we contend, did not pass by the grant of the act of 1866, because they had been already reserved to the United States by that part of the act of 1863, which granted lands to aid in the construction of the line of road on which the Leavenworth, Lawrence and Galveston road was built, and the withdrawal order of March 19, 1863, and the subsequent establishment of a line of definite location for the Leavenworth, Lawrence and Galveston road.

OPINION OF THE CIRCUIT COURT.

We venture to suggest that the learned court below committed an error in holding that the case in 118 U. S., 682, compelled it to decide that the act of 1866 was *in pari materiâ* with that part of the act of 1863 which relates to the line of road on which the Leavenworth, Lawrence, and Galveston road was built. As we understand the opinion in the former case, it merely lays down that the three statutes are *in pari materiâ* in so far as they relate to a line of road from Fort Riley down the Neosho Valley to the southern line of the State, and this is what this court means, we apprehend, when it says (p. 690) that—

> The history of the legislation of Congress and of the State of Kansas on this subject almost conclusively shows that the several statutes are to be taken and construed as *in pari materiâ*, AND THAT THE ONLY OBJECT WAS THE BUILDING OF ONE ROAD.

Again, the learned court below seems to have proceeded on the theory that it was the purpose of Congress in the act of 1866 to throw open both even and odd sec-

tions for indemnity purposes, but we have attempted to show that the statute does not admit of that construction.

THE SETTLERS.

There are settlers on some of the lands here involved who claim to have rights, and who are, by their request, represented by counsel in this case. In this proceeding, however, the United States is only asking to have its title to the lands in controversy relieved from the embarrassment of these patents, but it certainly does not weaken the case of the Government that the success of this suit may give repose to a number of persons who have settled on some of these lands in the honest belief that they were open to preëmption and homestead entry, and who may be able to secure recognition of their claims from the Land Department of the Government if these patents should be canceled.

But whatever rights or equities these settlers may have, it would seem that those rights or equities can not possibly fall within the scope of any decree this court may render on this bill.

It is proper to add that all persons who have purchased *in good faith* any of the lands covered by the patents are as fully protected by the fourth section of the act of March 3, 1887 (24 Stat., 556), as though the patents had been issued by competent authority.

It is submitted, in conclusion, that there appears to be error in the decree for which it should be reversed.

WM. A. MAURY,
Assistant Attorney-General.

APPENDIX

ACTS OF CONGRESS.

ACT OF MARCH 3, 1863.

AN ACT for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and is hereby, granted to the State of Kansas, for the purpose of aiding in the construction, first, of a railroad and telegraph from the city of Leavenworth, by the way of the town of Lawrence, and via the Ohio City crossing of the Osage River, to the southern line of the State, in the direction of Galveston Bay, in Texas, with a branch from Lawrence by the valley of the Wakarusa River to the point on the Atchison, Topeka and Santa Fé Railroad, where said road intersects the Neosho River; second, of a railroad from the city of Atchison, via Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Santa Fé, New Mexico, with a branch where this last-named road crosses the Neosho, down said Neosho Valley to the point where the said first-named road enters the said Neosho Valley; every alternate section of land, designated by odd numbers, for ten sections in width on each side of said roads, and each of its branches. But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections or parts of sections, designated by odd numbers as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid; which lands thus indicated by odd numbers, and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas

for the use and purpose aforesaid: *Provided*, That the land to be so selected shall, in no case, be located further than twenty miles from the lines of said road and branches: *Provided further*, That the lands hereby granted for and on account of said roads and branches severally, shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided: *Provided also*, That no part of the land granted by this act shall be applied to aid in the construction of any railroad or part thereof, for the construction of which any previous grant of land or bonds may have been made by Congress: *And provided further*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which, by such grant, shall remain to the United States, within ten miles on each side of said road and branches, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder, at or above the increased minimum price, as aforesaid: *Provided*, That actual and bona fide settlers, under the provisions of the pre-emption and homestead laws of the United States, may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid: *And provided also*, That settlers on any of said reserved sections, under the provision of the homestead law, who improve, occupy, and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

SEC. 3. *And be it further enacted*, That the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof for the purposes aforesaid and no other; and the said railroads and branches shall be and remain public highways for the use of the Government of the United States free from all toll or other charge upon the transportation of any property or troops of the United States.

SEC. 4. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: when the governor of said State shall certify to the Secretary of the Interior that any twenty consecutive miles of either of said roads or branches is completed in a good,

substantial, and workmanlike manner, as a first-class railroad, and the said Secretary shall be satisfied that said State has complied in good faith with this requirement, the said State may cause to be sold all the lands granted as aforesaid situated opposite to and within a limit of ten miles of the line of said section of road thus completed, extending along the whole length of said completed section of twenty miles of road, and no further. And when the governor of said State shall certify to the Secretary of the Interior, and the Secretary shall be satisfied, that another section of said roads or branches, twenty consecutive miles in extent, connecting with the preceding section, is completed as aforesaid, the State may cause to be sold all the lands granted and situated opposite to and within the limit of ten miles of the line of said completed section of road, and exteading the length of said section, and so, from time to time, until said roads and branches are completed. And when the governor of said State shall so certify, and the Secretary of the Interior shall be satisfied, that the whole of said roads and branches and telegraphs are completed in a good, substantial, and workmanlike manner, as first-class railroads and telegraph, the said State may cause to be sold all the remaining lands granted and selected for the purposes indicated in this act situated within the said limits of twenty miles from the line thereof throughout the entire length of said road and branches: *Provided*, That if any part of said roads and branches is not completed within ten years from the passage of this act no further sale shall be made, and the lands unsold shall revert to the United States.

SEC. 5. *And be it further enacted*, That the United States mail shall be transported over said roads and branches, under the direction of the Post Office Department, at such price as Congress may by law direct: *Provided*, That until such price is fixed by law, the Postmaster-General shall have the power to determine the same.

Approved March 3, 1863.

ACT OF JULY 1, 1864.

AN ACT making an additional grant of lands to the State of Kansas to aid in the construction of railroad and telegraph lines.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to the State of Kansas, to aid in the construction of a railroad and telegraph line from Emporia, via Council Grove, to a point near Fort Riley, on the branch Union Pacific Railroad, in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of said road: *Provided*, That this grant shall be subject to all the provisions, restrictions, limitations, and conditions, in regard to selection and location of lands and otherwise, of an act of Congress approved March three, eighteen hundred and sixty-three, entitled "An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said

State:" *Provided*, That said railroad shall be a public highway and shall transport troops and munition of war of the United States free of charge.

SEC. 2. *And be it further enacted*, That the branch railroad and telegraph from "Lawrence, by the valley of the Wakarusa River, to a point on the Atchison, Topeka and Santa Fé Railroad, where said road intersects the Neosho River," to aid in the construction of which a grant of lands was made by the said act of third of March, eighteen hundred and sixty-three, shall be so changed as to run from Lawrence to Emporia, and have and receive the grant of lands made by said act: *Provided*, That the line of railroad and telegraph from Leavenworth, by way of Lawrence and the Ohio City crossing of the Osage River to the southern line of the State in the direction of Galveston Bay, shall run via Baldwin City.

Approved July 1, 1864.

ACT OF JULY 26, 1866.

AN ACT granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile: but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the con-

struction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States: *And provided further*, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road.

SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which by the aforesaid grant shall remain in the United States, within ten miles on each side of said road, shall not be sold for less than double the minimum price of public lands when sold: *Provided*, That actual bona fide settlers under the preëmption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *Provided also*, That settlers under the provisions of the homestead act, who make their settlement after the passage of this act, and comply with the terms and requirements of said act, shall be entitled, within the said limits of ten miles, to patents for an amount not exceeding eighty acres each.

SEC. 3. *And be it further enacted*, That the grant of lands hereby made is upon condition that said company, after the construction of its road, shall keep it in repair and use, and shall at all times transport troops, munitions of war, supplies, and public stores upon its road for the Government of the United States, free from all cost or charge therefor to the Government, when required to do so by any Department thereof. And the lands hereby granted shall inure to the benefit of said company as follows: When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted within the limits above named, and coterminous with said completed section hereinbefore granted; and when certificates of the governor aforesaid shall be presented to said Secretary of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall, in like manner, issue to said company patents for the land for each of said sections of road, as in the first instance, until said road shall be completed: *Provided*, That if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States.

SEC. 4. *And be it further enacted*, That as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.

SEC. 5. *And be it further enacted*, That the United States mail shall be transported on said road and under the direction of the Post Office Department at such price as Congress may by law provide: *Provided*, That until such price is fixed by law the Postmaster-General shall have power to fix the compensation.

SEC. 6. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said Pacific Railroad Company, Southern Branch, its successors and assigns, for the construction of a railroad as proposed, and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables and water stations.

SEC. 7. *And be it further enacted*, That the acceptance of the terms, conditions, and impositions of this act by the said Pacific Railroad Company, Southern Branch, shall be signified in writing, under the corporate seal of the said company, duly executed, pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within one year after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

SEC. 8. *And be it further enacted*, That the said Pacific Railroad Company, Southern Branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas Rivers, to Fort Smith, in the State of Arkansas; and the right of way through said Indian Territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary grounds for stations, buildings, workshops, machine shops, switches, side tracks, turntables, and water stations.

SEC. 9. *And be it further enacted*, That the same grant(s) of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

SEC. 10. *And be it further enacted*, That said Pacific Railroad Company, Southern Branch, its successors and assigns, shall have the right to negotiate with, and acquire title to land for railroad purposes from any Indian nation or tribe authorized by the United

States to dispose of lands, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the United States, or from any company or parties incorporated or authorized for such purposes by such nation or tribe, or which such parties may have acquired under the laws of the United States.

SEC. 11. *And be it further enacted*, That any railroad company chartered under any law of the United States, or of any State which may have been heretofore or shall hereafter be organized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho or Grand River, upon just, fair, and equitable terms, to be agreed upon between the parties, as shall not be against the public interest or the interest of the United States.

Approved July 26, 1866.

o

The provision of the Act of 1863 granting lands to the state of Kansas to aid in the construction of certain Railroads ~~provides~~ after granting ~~them~~ every alternate section designated by odd numbers within 10 miles along the line of each road that "if the U.S. have at the time the lines or branch shall be located sold any section of parts thereof granted as aforesaid, or if any preemption or homestead settlement shall have attached to the same, or if the same shall have been reserved to the U.S. for any purpose whatever, then other lands designated by odd numbers in equal number shall be selected by said road thereupon it shall be the duty of the Secretary of the Interior to select from other public lands nearest to the sections designated by odd

purposes from any Indian nation or tribe authorized by the Council

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In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
against
THE MISSOURI, KANSAS AND TEXAS Railway Company, and others claiming lands as its vendees.
No. 733.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF AND ARGUMENT FOR PLAINTIFF, THE UNITED STATES.

WILLIAM LAWRENCE,
Of Counsel, representing Settlers.

In the Supreme Court of the United States.

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BRIEF AND ARGUMENT FOR THE UNITED STATES.

MATERIAL FACTS.

Some of the facts material in this case are as follows:

I. *February* 12, 1858, an act of the Kansas Territorial legislature incorporated the Leavenworth, Lawrence, & Fort Gibson Railroad Company, subsequently named the Leavenworth, Lawrence, & Galveston Railroad Company—called the "L., L. and G. Co.," since known as *the Kansas City, Lawrence & Southern Kansas Railroad Company.*

II. *February* 11, 1859, the Territorial legislature incorporated the *Atchison, Topeka & Santa Fe Railroad Company* [A., T. & S. F. Co.]

III. *The act of congress of July* 1, 1862—12 Stat. 489, sec. 9—made a land grant to the Leavenworth, Pawnee & Western Railroad Company, which it accepted November 14, 1862.

The act of July 2, 1864—13 Stat. 358, sec. 4, 12—enlarged the grant to that company by its then name of the Union Pacific Railroad Company, eastern division, which it accepted.

The grant was of alternate odd sections for twenty miles on each side of its line.

This company is now known as the Kansas Pacific Company.

See Joint Res. Congress, 15 Stat. 348; Act March 12, 1865, 13 Stat. 504; Joint Res. May 7, 1866, 14 Stat. 355; Act July 3, 1866, 14 Stat. 79; Joint Res. July 26, 1866, 14 Stat. 367; *R. R. Bridge Co.* v. *K. P. Co.*, 92 U. S. 315; 12 Kansas Rep. 409.

It constructed its road, as required by the grant, on a line through Fort Riley or Junction City—and has received title for its granted and indemnity lands.

In letter of July 25, 1888, of the Acting Commissioner of the General Land Office to William Lawrence, it is said:

> The length, east and west, of the Fort Riley Military Reservation in Kansas, is about *eight* miles in the largest part of the reservation.
>
> The Mo., Kan. and Texas R. R. connects with the Kansas Pacific Road at Junction City.

> The diagram of the reservation on file in this office shows that the Junction City town site corners on the reserve at the south-west portion thereof, although the town is about four miles from the Fort on the Reservation.

The court will take judicial notice of the location of Military Reservations.

IV. *March* 3, 1863, Congress having in view said acts of 1858 and 1859, passed an act (12 Stats. 772), by which it is declared that "there is hereby granted to the State of Kansas" certain alternate odd numbered sections of lands, "for the purpose of aiding in the construction" of two railroads and branches thereof, to-wit:

> *First*, of a railroad and telegraph from the city of Leavenworth, by way of the town of Lawrence, and *via* the Ohio City crossing of the Osage River, to the southern line of the State, in the direction of Galveston Bay, in Texas, WITH A BRANCH from Lawrence, by the valley of the Wakarusa River, to the point on the Atchison, Topeka & Railroad, where said road intersects the Neosho River.
>
> *Second*, of a railroad from the city of Atchison *via* Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Santa Fe, New Mexico, WITH A BRANCH *from where the last-named road crosses the Neosho* [Emporia] DOWN SAID NEOSHO VALLEY TO THE POINT *where the said first-named road* ENTERS *the said Neosho Valley.*

The A., T. & S. F. ROAD, running in a southwesterly direction, crosses the Neosho River and Valley at EMPORIA, while the L., L. & G. ROAD, running in a

southerly direction, "ENTERS said Neosho Valley," a distance of some —— miles southeast of Emporia, and beyond all doubt on *the north-east side of the Neosho River.*

V. *February* 9, 1864, the legislature of Kansas accepted the grant made by said act of Congress of March 3, 1863, and made the L., L. & G. and the A., T. & S. F. companies the beneficiaries, "in consideration" that they would respectively construct the proper line of roads and branches.

The Kansas act of February 9, 1864 (Laws of Kansas, 1864, p. 149), also *asked* Congress to—

> CONSENT that the Neosho Valley branch of the above-named road [A., T. & S. F. Co.] MAY BE EXTENDED so as to intersect the Union Pacific Railroad, Eastern Division, AT OR NEAR FORT RILEY.

But Congress REFUSED to assent. *M. K. & T. Ry. Co.* v. *K. P. Ry. Co.*, 97 U. S. 491.

February 16, 1864, the A., T. & S. F. Co. accepted the Kansas act of February 9, 1864. The L., L. & G. Co. also accepted.

VI. *July* 1, 1864, Congress passed an act—13 Stats. 339—making an additional grant of lands to the State of Kansas in aid of a road from Emporia *via* Council Grove to a point near Fort Riley on the branch Union Pacific Railroad.

It is important to observe that *Emporia* is *specifically named* as the starting point and that the road is to be made *via Council Grove*—an entirely different line with *different points* and shorter than the road authorized by the act of July 26, 1866, hereafter mentioned.

It specified *no company* to make a road, as did the act of July 26 1866. It is important to observe also, that the Supreme Court at October Term 1878 practically held that this act of 1864, was *inoperative*, because *not accepted* by the Legislature of Kansas. Thus in *M. K. & T. Co.* v. *Kansas Pacific* Co 97 U S 49 Field J says:

> This act of 1864 *was never accepted by the State* of Kansas. No route of a road between the points designated in it was ever located by the company, nor was any map of the proposed route ever filed in the Department of the Interior. Nothing, indeed, was done by the State or company under the act until after *the grant it offered had been* SUPERSEDED by the acceptance of the greater and more valuable grant made by the subsequent act of July 26, 1866, which covered the lands.

VII. *September* 20, 1865, under the general corporation statute of Kansas, the "Union Pacific Railway Company, Southern Branch," was organized, subsequently named "Missouri, Kansas & Texas Railway Company."

Thereupon Congress considered the propriety of making a land grant in its favor as a separate, distinct, long line of road, commencing near Fort Riley, running "down the Neosho Valley to the Southern line of the State with a view to an extension of the same, through a portion of the Indian Territory to Fort Smith, Arkansas," and to secure this object passed the act of *July* 26, 1866—14 Stats. 289—which *expressly named* the M., K. & T. Co. as beneficiary.

December 6, 1866, this company accepted the grant. It filed its map of definite location in Interior Department, January 7, 1868 (Rep. Sec'y Int. 1878, pt. 1, p. 61).

The law did not *require* this road to pass through *Emporia*, or to cross or *connect* with the L., L. & G. road. In terms it contemplated a distinct line; that *portion* of it, southward of Emporia to the extent of the full length of the Emporia branch of the A., T. & S. F. Co., would run in the same valley, but *not necessarily in the same general direction*.

Here were three distinct grand lines of road provided for, each company starting from a different point, each having a different destination, each having its object as a through line, with a provision for *two branches*, in no way *interfering* with or *superseding the construction of any main line*, and the construction of neither main line, in any way superseding the *necessity of the branches*, so far as appears by any *express* words of the statute, or by inference therefrom, or otherwise.

VIII. *March* 19, 1864, the A., T. & S. F. Co. assigned its right to construct the road required by the act of July 1, 1864, and the Emporia branch, to the M., K. & T. Co.

The A., T. & S. F. Co. had then acquired no right to make the road required by the act of 1864. The state had not accepted it or given any such right. A joint resolution of the Kansas legislature of February 26, 1867, assumed to ratify the assignment.

It has been held, however, as it is believed under a misapprehension of material facts as hereafter shown, that the road required by the act of 1864, and the Emporia branch, were, by the legislation mentioned, merged into the main line of the M., K. & T. road, and that the

effect of all was to require but one line of road, and to be constructed by the M., K. & T. Co. *Brewster case*, 118 U. S. 682.

But we now maintain that the M., K. & T. Company could not claim any land under the act of 1864, which, as Justice Field said, was *superseded*.

The three *main lines* of road, the A., T. & S. F., the L., L. & G. and the M., K. & T., have been constructed, and each company has received lands granted "in place" for its main line. The A. T. & S. F. Co. NEVER LOCATED the *Emporia branch*; none of the *branches* were ever *located* or constructed by any company.

The L., L. & G. company was given by the act of 1863 ten years to complete its road, and *earn indemnity lands*, and this right continued until forfeited by the act of July 24, 1876, 19 Stats. 101; *Schulenberg* v. *Harriman*, 21 Wallace, 44. This company failed to construct its road from Leavenworth to Lawrence, failed to construct any branch, and so earned no indemnity lands.

The M., K. & T. Road and the L., L. & G. road are so constructed that the *indemnity limits* of the M., K. & T. Road overlap the *granted limits* of the L., L. & G. Road in Allen county, and the indemnity limits of the two roads overlap in that county.

Under the act of July 26, 1866, patents were issued by the United States for *even sections* of lands as indemnity to the M. K. & T. Co. in these two overlaps, on November 3, 1873, March 19, 1875, August 17, 1876, and April 23, 1877.

These were issued on *even* sections, "selected," as indemnity, within the ten mile limits of the L., L. & G.

Road, August 10, 1872, approved by the Secretary of the Interior October 14, 1873, and within the common indemnity limits April 14, 1873; July 29, 1874, and November 7, 1876.

There are two classes of lands in controversy in this case:

First, EVEN SECTIONS *within the indemnity limits of the M., K. & T. Road overlapped by and within the ten mile or granted limits of the L., L. & G. Road.*

Second, EVEN SECTIONS *in the common indemnity limits of of the L., L. & G. Road and the M., K. & T. Road.*

And of both classes.

Third, There are classes to which homestead and pre-emption rights of settlers had attached at two periods:

1. *Prior to the act of July 26, 1886, and,*

2. *After July 26, 1866, but prior to any selection of such lands by the Secretary of the Interior as indemnity lands for the M., K. & T. Road.*

THE PLEADINGS.

February 19, 1886, the United States filed its original bill in equity against the M., K. & T. Ry. Co. and its grantees to cancel the patents issued to said company. December, 1887 an amended bill was filed by leave of court.

The M., K. & T. Co. filed demurrer.

Other defendants answered.

The United States has the right to have all evidence of title in the M., K. & T. Co. cancelled as to *even* sections *within the indemnity limits of the two roads,* and within *the*

ten mile or granted limits of the L., L. & G. Road, for the following among other reasons:

I. *The act of March 3, 1863 (12 Stat. 772), making a grant in aid of the L., L. & G. Road—*

1. *Expressly reserved these sections* to the United States, and the act of July 26, 1866 (14 Stat. 289), does not repeal the former reservation, but recognizes and re-enacts the same reservation; and

2. Besides this, the act of 1866 is not applicable to *these* lands.

3. And hence the patent issued to the Railroad Co. for these lands is absolutely *void*.

II. The M., K. & T. Road deflects an average distance of 2 miles from its line of location, and for that reason failed to earn any indemnity lands—the lands in controversy are claimed by that company as indemnity—and the patents therefore are unauthorized.

III. The M., K. & T. Co. has failed to comply with the "*conditions subsequent*" provided for in the act of 1866, requiring it to complete the road *on the line of location*, and *maintain it since* on that line.

IV. The lands were not subject to grant, because of the New York Indian Reservation created by treaty of 1838—7 Stat. 550.

V. The M., K. & T. Co. has received more lands than it is lawfully entitled to, exclusive of the lands now in question, and which are the lands *last selected* for and patented to said company.

VI. As to portions of the lands, rights of settlers under the pre-emption and homestead laws had attached prior to the Act of July 26, 1866.

As to others, similar rights attached before actual *selection* for indemnity by the Secretary of the Interior.

If ANY *ONE* of the first FIVE propositions is well taken, the United States must hold *ALL* the lands; the *last* relates to a *portion* only.

The United States is entitled to hold the lands in the common indemnity limits of the L., L. & G. Road and the M., K. & T. Road, because:

I. The act of 1863 limited indemnity selections for the L., L. & G. Road to *odd* sections; *thus reserving* the *even sections* to the United States, and the act of 1866 expressly reserved them from indemnity selection for the M., K. & T. Road.

II. *All* the *propositions* stated as to the *even* sections within the granted limits of the L., L. & G. Road apply to the even sections within the common indemnity limits of the two roads.

ARGUMENT.

As to Lands within Granted Limits.

Some of the PROPOSITIONS, on which the United States rests its claim to the lands within the *granted* or *ten-mile* limits of the L., L. & G. Road will now be considered.

It may be remarked again that the lands now claimed by the M. K. & T. Co. are (1) part within the 10-mile *granted* limits of the L. L. & G. Co. under the act of 1863, and (2) part within the *common indemnity* of both roads.

FIRST PROPOSITION.

THE ACTS OF MARCH 3, 1863, AND JULY 26, 1866, EXPRESSLY "RESERVE" THESE LANDS TO THE UNITED STATES, FROM INDEMNITY SELECTION.

This is so for at least *six* several reasons:

I. REASON.—THIS PROPOSITION IS CONCLUSIVELY SUSTAINED BY (1) THE HISTORY OF LAND GRANT ACTS; (2) BY CONTEMPORANEOUS AND LONG CONTINUED CONSTRUCTION; AND (3) BY THE FACT THAT LAND GRANT ACTS HAVE BEEN PASSED BY CONGRESS ON THE FAITH OF THE CONSTRUCTION SO GIVEN.

(1) HISTORY OF LAND GRANT ACTS.

On June 16, 1886, Hon. L. Q. C. Lamar, then Secretary of Interior—now a Justice of the Supreme Court of the United States—decided that the patents mentioned were unlawfully issued, because the lands were *expressly reserved* from indemnity selection by the act of 1866 (Missouri, Kansas Texas Ry. Co. case, 4 Interior Department Land Decisions 573.) He quotes the *reserving proviso* of the act of 1866, and shows from the history of earlier and similar provisos that its purpose was to save these lands to the United States. He says:

> The first act granting land to aid in the construction of a railroad was that of the Illinois Central road, made in 1850 (9 Stat. 466). [which grants "every *alternate* section of land designated by even numbers for six sections in width on each side of

said road"]. In that act, the original of the above *proviso* was used for the first time by Congress. It did not appear in the bill as first formulated and introduced, but was added subsequently, for the following reason: Prior thereto, on March 2, 1827. [4 Stat. 234], Congress had granted to the State of Illinois, for the purpose of aiding in the construction of the Illinois canal.

"A quantity of land equal to one half of five sections, in width, on each side of said canal, and *reserving* each alternate section to the United States," *etc.*

During the debate in the senate on the bill in aid of the Illinois Central [R. R.], it was noticed that at a certain point the grant for said canal, would be *overlapped* by the proposed grant for the *railroad*. Thereupon the *proviso* was added to the second section of the bill, as follows:

"And provided further that any and all lands reserved to the United States by the act entitled, "an act to grant a quantity of land to the State of Illinois for the purpose of aiding in opening a canal to connect the waters of the Illinois river with those of Lake Michigan," approved March 2, 18. 7, be, and the same are, hereby reserved to the United States from the operations of this act."

Senator Whitcomb in proposing the amendment said:

"To enable the amendment to which I now refer to be understood, I will premise that the branch of this railroad, which leads from its northern terminus to Chicago, must be along side the canal connecting these points, and for the construction of which Congress made to Illinois, on the 2d of March, 1827, a similar grant of lands along its entire length, every alternate section being at the same time reserved to the United States. These reserved lands will neces-

sarily lie within the scope or limits of the proposed grant now under consideration, and will consequently be subject to further selection, notwithstanding their previous reservation. The language of the bill is substantially that all the lands belonging to the United States, not heretofore disposed of, or to which a right of premption has not attached, shall be divided equally between Illinois and the United States. I shall propose therefore at a suitable time, an amendment that will *save the lands reserved under the former grant from the operation of this one.*" (Cong. Globe, Vol. 21, P. 900).

The proviso was accordingly introduced and adopted.

During the next Congress only one land grant was made, and that to the State of Missouri in aid of the Hannibal & St. Joseph Road. Another to the State of Iowa passed the Senate, but failed in the House. These two bills were framed in exactly the same words, except the names of the States, termini, *etc.* The Iowa bill was reported by the Senate committee on Public Lands as a "*model bill*," and that they had "shaped all the others which are to follow it for grants of lands for like purposes in other states after this model."

The bill as well as the grant to Missouri, contained the *proviso* in question, but *changed only so as to make its terms general*, as follows:

"*And provided further*, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, be, and the same are hereby reserved to the United States from the operation of this act."

The language of this *proviso* was preserved by

> Congress in all subsequent grants for a similar character. By comparing this *proviso* [of the act of July 26, 1866, making the grant for the M. K. & T. Co.] with that in the original railroad grant to Illinois—it will be seen that they were enacted to serve the same purpose. They bear the same relation to the section—they commence and end with the same words. One relates to a particular reservation, the other is made applicable to *all* reservations. In the first grant the only conflict was with the canal, and therefore the reserved sections within its grant were *alone* excepted. Railroad grants afterward multiplied and extended, and consequently the *proviso* was generalized so as to apply to *all* cases of conflict between such grants. *Adopting this view, I am of the opinion that the even sections in question within the granted limits of the Leavenworth, Lawrence & Galveston road were reserved from the operation of the act* [of July 26, 1866] *in aid of the Missouri, Kansas & Texas, and that the patents for the same were issued without authority of law.* 4 Int. Dep. Land Dec. 573.

AS TO LANDS IN THE COMMON INDEMNITY LIMITS OF BOTH ROADS.

Secretary Lamar then quotes the act of March 3 1863 making provision for indemnity of "*so much land in ALTERNATE sections or parts of sections decignated by odd numbers,* as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated," and he then says:

> By this act, selection of indemnity lands by the Secretary was restricted to *odd* sections. Under no circumstances could *even* sections in these limits pass under the act of 1863. I am of opinion, therefore, that the *even* sections within the limits in question,

were so *reserved* to the United States as to fall within the exception created by said *provision* in the act of 1866.

These conclusions are fully sustained by the history of the *proviso* more fully discussed in the argument of Britton & Gray to which reference is hereafter made.

The act of 1863, by making a grant in ALTERNATE odd sections, adopts the *policy of reserving* ALTERNATE *sections* to the United States; that is, the "policy of alternation" previously referred to by Secretary Thompson.

(2) CONTEMPORANEOUS CONSTRUCTION.

All the decisions of the Interior Department, and the administration of all the land grants, have been in accord with these principles, and these settle principles, which, except the indemnity selection of *even* sections under the act of 1866.

Among the decisions are the following:

1. *November* 20, 1855. Secretary R. McClelland decided that the *grant* of swamp lands by act of September 28, 1850 (9 Stat. 519), did not include *alternate* sections within the *granted* or *indemnity* limits of the grant in aid of the Illinois Central R. R. by act of September 20, 1850 (9 Stat. 466), 1 Lester Land Laws 521.

The act of Sept. 20, 1850, *granted* in aid of the railroad the *alternate even sections* for six miles on each side of the road, and gave *indemnity* between the six and fifteen mile limits of land "in alternate sections." The company received its *granted* and *indemnity* lands.

The swamp land act of Sept. 28, 1850, granted to the states "the *whole* of those swamp lands" in each state un-

sold at the passage of the act. There was no *express reservation* to the United States of lands reserved by the railroad act. Yet Secretary McClelland said as to the *alternate reserved* sections within the *granted lands:*

"The state had no right under the act of the 28th September, 1850, to any of the land *within the six mile* [granted] *limits* which had been *reserved* by the President [by the statute itself] under the act of 20th of September, 1850 for the *special purposes of that* act, to-wit: THE REIMBURSEMENT TO GOVERNMENT for the *granted lands.*"

As to the lands in INDEMNITY limits he said:

"She [the state] has no right to the lands within the fifteen mile [indemnity] limits."

The same *reason* applied as within the six mile limits—"THE REIMBURSEMENT *to government* for *the* GRANTED *lands.*" Apparently the swamp act made an absolute grant of *all* swamp lands, yet that could not include lands *reserved by the policy of the railroad act.*

2. *October* 28, 1859.—Secretary Jacob Thompson decided that the act of June 3, 1856 (11 Stat. 17), granting lands in aid of the Girard & Mobile R. R., *reserved* from indemnity selection all lands within the *granted* and *indemnity* limits of the Montgomery & Pensacola R. R., under the prior act of May 17, 1856. (11 Stat. 15). MS. decision.

This is presented somewhat fully hereafter.

3. *May* 2, 1878.—Secretary Carl Schurz affirmed Secretary McClelland's decision of November 20, 1855.—4 Land Dec. 4.

4. On *May* 2, 1878, *June* 28, 1880, and *March* 2, 1881. —Secretary Schurz, after taking the opinion of Attorney-General Devens, dated February 21, 1881, again affirmed Secretary McClelland's decision of November 20, 1855.—4 Int. Dept. Land Dec. 4. In that opinion Attorney-General Devens said:

> The rule laid down by Secretary McClelland, in November, 1855, has been the rule of adjudication in the Department for *twenty-five years*, with but a single exception, and that apparently inadvertence. * * * If it has not conformed to the intention of Congress, that body has had ample time to rectify it by declaratory legislation.

5. *June* 3, 1886.—Secretary Lamar, in recommending "that suits be brought [by the U. S.] to set aside the patents issued to the Atlantic & Pacific Company, for lands within the six mile limits of the grant of [June 10,] 1852, (10 Stat. 8), for the Southwest Pacific Co.," referred to the decision in the Illinois case [McClelland, Nov. 20 1855] and said: "The principle announced above remains unchanged." Referred to in *Rogers* v. *Atlantic & Pacific Co.*, vol. 13 Copp's Land Owner, September 15, 1886.

6. *June* 16, 1886.—Secretary Lamar decided that the act of July 26, 1866, [14 Stat. 289] *reserved* the lands now in controversy from indemnity selection in favor of the Missouri, Kansas & Texas Ry. Co., and recommended this suit if the attorney-general, "upon further examination," deemed such suit advisable.—4 Int. Dep. Land Dec. 573.

And the suit is here upon the authority of the attorney-general.

December 17, 1886.—Acting Secretary Muldrow affirmed the same decision.—5 Int. Dep. Land Dec. 280.

7. *September* 6, 1886, the Acting Commissioner of the General Land Office, in *Rogers* v. *Atlantic & Pacific R. R. Co.*, held, that the act of July 27, 1866 (14 Stat. 292), making a grant in aid of the Atlantic & Pacific R. R. of alternate odd sections, with a right to indemnity, reserved from selection for indemnity, the odd sections within the granted limits of the South West Pacific R. R. in aid of which the act of June 10, 1852, (10 Stat. 8) made a grant of alternate even sections. He said that if this were not so "THE RESULT WOULD BE THAT A SOLID BLOCK OF LAND" would be taken. See XIII Copp's Land Owner, Sept. 15, 1886, p. 135.

8. Numerous other decisions all adopt the same principles.

Alabama & Chattanooga R. R. Co. v. *Tennessee & Coosa R. R. Co.*, January 29, 1887, 5 Land Dec. 582.

The opinion of Secretary O. H. Browning, of March 25, 1867, held that in a contingency the M., K. & T. Co. "will become entitled to patents for such odd sections, and also for such even sections as remain to the United States OUTSIDE THE TEN AND WITHIN TWENTY MILES OF THE ROAD, UPON complying with all the terms, conditions and stipulations of the act of July 26, 1866." Printed Record Brewster Case, p. 67; 118 U. S. Rep. 682.

It will be observed *he does not hold that the M., K. & T. Co. could take indemnity lands within the ten-mile limits of any railroad.* His opinion as to even sections outside of the ten-mile limit seems to have been given without argu-

ment, with apparently little consideration, without reference to any of the previously decided cases holding otherwise, as to "overlapped" lands, and apparently *without a knowledge that the even sections within the twenty-mile limits of the M., K. & T. Road were as to any part within the overlapping indemnity limits of the L., L. & G. Road.* His opinion seems applicable *only* to even sections OUTSIDE OF ANY OVERLAP.

Thus it is shown, that the purpose of Congress in adopting the "RESERVING PROVISO" was to *meet just such case as this;* that the Interior *Department has uniformly so applied it; that all the land grant acts* have been passed by Congress *with a knowledge of such rulings*, and that *not one solitary* decision by any officer or court is found to sustain a different view.

The maxim may be well applied in this case—*Contemporanea expositio est optima et fortissima in lege.*

What will be the effect of reversing rulings and a practice of *forty years*, commencing with the first land grant act of 1850?

As the rights of all claimants of lands are fixed by *these granting acts*, which are *notice to all the world*, and as the statute of limitations does not run against the United States, nor any State, all these rulings may be opened up, and the title unsettled to the unnumbered millions of acres of land affected by them.

Under the swamp land grant acts to the States claims will be revived, and general and wide-spread ruin will be brought to present occupants under patents.

The court will not readily or willingly open the way for such fearful consequences.

II. REASON. THE WORDS EMPLOYED IN THE ACTS OF 1863 AND 1866 ARE CLEAR AND EXPLICIT IN RESERVING THESE LANDS FROM INDEMNITY SELECTION.

The act of 1863 makes a grant only of—

"Every *alternate section of land* designated by *odd numbers* for ten sections in width on each side of said roads, and each of its branches."

Here is a grant only of *alternate* sections within the ten-mile limits. It follows the *policy of alternation*.

The act of 1863 proceeded to dispose of the *even* sections within the ten mile limits of both roads in the following words:

> SEC. 2. That the [even] *sections* and parts of sections of land which, by such grant, SHALL REMAIN *to* THE UNITED STATES, within ten miles on each side of said road and branches, *shall not be sold for less than double the minimum price of the public lands when sold;* nor shall any of said land become subject to sale at private entry, until the same shall have been first offered at public sale to the highest bidder, at or above the increased minimum price as aforesaid, *Provided*, that actual and *bona fide* settlers, under the provisions of the preemption and homestead laws of the United States, may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid; *and provided, also*, that *settlers* on any of said *reserved sections*, under the provisions of the homestead law, who improve, occupy and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, *shall be entitled to patents to an amount not exceeding eighty acres each*, anything in this act to the contrary notwithstanding.

This section by its very words describes *these* lands as lands which "REMAIN TO THE UNITED STATES;" again it calls them "RESERVED SECTIONS."

Their *reserved* character is so firmly fixed in our legislation that the act of June 8, 1872 (17 Stat., 333, Rev. Stat., 2304) gives soldiers a right to take them as homesteads for which purpose they are called, "the alternate RESERVED SECTIONS of public lands along the line of any railroad or other public work."

This applies as well to lands reserved in the *indemnity limits* as to land reserved within the *granted limits* of a railroad.

The act of 1863 declares that the *general laws* relating to the sale, pre-emption and homestead of lands granted by it shall no longer apply to them. It declares that pre-emption settlers may buy them at double minimum price. It gives homestead settlers a right to take *not* 160 acres, as under the *general law*, but only 80 acres *under this act*.

Thus the act of 1863 expressly, and AFFIRMATIVELY, RESERVED these lands *to the United States*, and *devoted* them to *special particular* purposes. If that does not *reserve* them what legislation could do so?

These purposes were a part of the CONSIDERATION on which the State of Kansas by accepting the grant, agreed to cause the L., L. & G. Road to be made. It was an important *consideration*, because every pre-emption or homestead settler who took 80 acres of these lands, *enhanced the value* of the *granted lands*, and made passenger and freight transportation for the L., L. & G. Co. The company in fact acquired a *vested right* to have these conditions performed. It would be a *breach of faith*,

and a violation of *vested rights*, for congress to change the disposition of these lands thus provided for, and give them to the M., K. & T. Co.

III. REASON. THE RESERVATION AND DISPOSITION THUS MADE OF THESE LANDS WAS NOT CHANGED BY THE SUBSEQUENT ACT OF JULY 26, 1866 (14 STAT. 289), IN FAVOR OF THE M., K. & T. CO.

This will appear for several reasons:

1.—The act of 1866 *expressly reserves* these lands from the operation of its granting or indemnity provisions.

It makes a grant in favor of the Union Pacific R. R. Co., southern branch, now called the Missouri, Kansas & Texas Railway Co., as follows:

> That for the purpose of aiding the Union Pacific Railroad Company, southern branch, [now M., K. & T. Co.] *to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas*, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every *alternate* section of land or parts thereof designated by *odd* numbers, to the extent of five alternate sections per mile *on each side of said* road, and not exceeding in all ten sections per mile.

Here is a grant of *odd sections only*.

Then comes the indemnity clause, with a *proviso* as follows:

> But in case it shall appear that the United States have, *when the line of said road is definitely located*,

But in case it shall appear that the U. S. shall, within the said shall be duly located have sold any sections or any part thereof, granted as aforesaid, for that the right of pre-emption or home-stead settlement has attached to the same, or that the same has been reserved by the U. S. for any pur-pose whatever

sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, *from the public lands of the United States nearest to the sections above specified*, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands thus indicated by the direction of the Secretary of the Interior shall be reserved and held for the State of Kansas, for the use of said company, by the said Secretary, for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and ALL LANDS HERETOFORE RESERVED to *the United States* by any act of Congress, [the L L & G. act of 1863] or in any other manner by competent authority for the purpose of aiding in *any object* of internal improvement *or other purpose whatever* [for homestead and pre-emption claimants under section 2 of the act of 1863] be *and the same are hereby* RESERVED *and* EXCEPTED FROM THE OPERATION OF THIS ACT, except so far as it may be found necessary to locate the route of said road through such RESERVED LANDS, in which case the right-of-way, 200 feet in width, is hereby granted, subject to the approval of the President of the United States. *And provided further*, That said lands hereby granted shall not be selected beyond 20 miles from the line of said road."

Here is a *clear, explicit, unequivocal* RESERVATION, which, by its *express terms*, is *applicable to these lands.*

Unless it applies to *these lands* to what lands can it apply? If there be *any doubt* on these questions it is to be *resolved against the grant* and in *favor of the* RESERVATION. L. L. & G. Co. v. U. S. 92, U. S. 749.

They are excepted from the entire "operations of this act."

The Supreme Court has said of the act of 1866:

> Every tract [of land previously] *set apart for special use* [as these lands were by the act of 1863] is reserved to the government to enable it to enforce them. There is no difference in this respect, whether it be *appropriated for* Indian or for *other purposes*. There is an equal *obligation resting on the government* to require that neither class of reservations *be diverted from the uses to which it was assigned*." *L. L. & G. R. R. Co.* v. *U. S.*, 92 U. S. 747.

Any attempt by Congress to withdraw the privileges —indeed rights—thus given to settlers, would have been an act of bad faith to them, and to the State of Kansas, and to the L. L. & G. R'y Co., which a just construction of the act of 1866, does not require to be imputed to that body.

It would be bad faith not merely to settlers, but to the L. L. & G. Co., which made its road with a distinct *statutory pledge, that the* EVEN *sections should be devoted to settlement to make business for its road.*

Fortunately, good faith is preserved by the rule that—

> Whatever is included in the exception is excluded from the grant. * * What is not given expressly or by necessary implication, is withheld. * * Congress could not be supposed to have * * intended to include the land previously *appropriated to another purpose*. 92 U. S. 740.

And in this connection the rule of construction applicable to land grants may be invoked that:

> If there are doubts about * * the extent of the grant, the Government is to receive the benefit of them. *L. L. & G. R. R. Co.* v. *U. S.*, 92 U. S. 746. "Whatever is not given expressly or *very* clearly implied from the words of the grant is withheld." Attorney-General Black, 9 Op.

NO REPEAL BY IMPLICATION.

IV. REASON. ANOTHER VIEW OF THESE STATUTES IN CONNECTION WITH WELL SETTLED RULES OF CONSTRUCTION, LEADS TO THE SAME RESULT. THE ACT OF 1866 CAN NOT SUBJECT THESE LANDS TO INDEMNITY SELECTION FOR THE M. K. & T. CO., WITHOUT REPEALING THE SPECIAL PROVISIONS OF THE ACT OF 1863, DEVOTING THESE LANDS TO SPECIAL DOUBLE MINIMUM PRE-EMPTION AND HOMESTEAD ENTRIES, AND IT HAS NOT SO REPEALED THEM.

The act of 1863, in *affirmative* terms, denominates these as "RESERVED SECTIONS," and then in *affirmative* terms makes "specific provisions" different from the *general laws* on the subject (Rev. Stat. 2257, 2259, 2265, 2289, 2291), by which the *even sections* are to be disposed of for 80 acre homesteads, etc., by provisions to be *liberally* construed in favor of maintaining a wise policy.

Now these provisions of the act of 1863 remain in force unless repealed by the act of 1866, which authorizes indemnity selections "from the public lands of the United States."

1. The act of 1866 does not *expressly repeal* any provision of the act of 1863 as to these lands. Repeals by implication are not favored. *McCool* v. *Smith*, 1 Black. 459; *U. S.* v. *Taylor*, 104 U. S. 218.

This rule is conclusive against construing the act of 1866 as giving indemnity rights in these lands.

But there is still another:

2. The *general words* of the act of 1866, giving indemnity rights in the "public lands," are to be so construed as not to apply to, or repeal the *special provisions* of the act of 1863 as to these lands. Thus it has been stated:

> The general words of a statute may be *restrained* according to the *subject matter* to which * * it relates. Broom Legal Max., 646; Sedgwick Stat., 2nd Ed., 360.

So it is well settled, as a general rule, that:

> An affirmative statute does *not repeal* a precedent affirmative statute; and that if *the substance of both may stand together*, they should *both* be *enforced*." Sedgwick 32; Potter's Dwarris, 74; *Wallace* v. *Holmes*, 9 Blatchford, C. C. 65.

Another rule:

> A thing which is *given in particular* shall not be taken away by *general words*. *Generalis clausula non porrigitur ad ea quae specialiter sint comprehensa.* Sedgwick 361; Potter's Dwarris, 513, 668.
>
> Specific provisions * * are not repealed or *affected* by the general words of a subsequent statute. *Movius* v. *Arthur*, 95 U. S. 44; *Arthur* v. *Lahey*, 96 U. S. 113.

In *Fosdick* v. *Perrysburg*, 14 Ohio St. 47, the rule is thus stated:

> It is an established rule in the construction of statutes, that a subsequent statute treating a subject in *general* terms, and not expressly contradicting the provisions of a prior act, shall not be considered as intended to affect *more particular* [special] and positive provisions of the prior act, unless it is absolutely necessary to do so, in order to give its words any meaning.

The facts were: A *special* legislative act of March 5, 1851, gave the village of Perrysburg power to subscribe to the capital stock of a railroad corporation, and levy a tax *without limit* as to the rate of taxation to pay therefor. The subsequent general statutes of May 3, 1852, in terms limited the authority of *all* villages as to the rate of taxation. The village of Perrysburg claimed a right under the prior *special* act to levy more taxes than were authorized by the later *general* act. On the other hand, it was claimed that the later *general* statute repealed *pro tanto* the larger power of taxation given in the special act. The court held that the *special* power of taxation was not limited or repealed by the *general* statute. In other words, the *special* power of jurisdiction is *exclusive* of the general.

This rule is illustrated in numerous cases cited in *Huidekoper's case*, 3 Lawrence, Comptroller's Decisions, 161, to which latter case reference is made, not at all as authority, but for a *collection of cases* which are conclusive authorities.

An example may be given of the application of this rule. The act of July 8, 1870, (16 Stat. 207), gave the common law action of case to a party whose patent right was

infringed. The *later* act of June 1, 1872 (17 Stat. 197), adopted in *general* terms for the courts of the United States the *state practice* in each circuit including the so-called Civil Code practice and *forms of procedure*. This act was sufficiently general in terms to repeal the special action given in patent cases. But the Revisers of the U. S. Statutes, and the courts, have held that the *general* statute adopting the code forms and practice, did not repeal or affect the *prior special* provision giving the action of case for infringement of patents. See Rev. Stats., U. S. 4919, 914.

APPLICATION OF RULE AS TO REPEALS.

The application of these principles may now be made:—

The act of 1863 makes a *specific provision*—different from all *general laws* on the subject (Rev. Stat. 2257, 2259, 2265, 2289, 2291), by which the even sections are to be disposed of for 80 acre homesteads, etc.

These lands are reserved—they were *appropriated* to another purpose—they are subject to *homestead* entry; *the even sections of the land within the ten-mile limits of* the L., L. & G. Road were *specially appropriated* for *specially* limited 80 acre homestead entry, or for sale or preemption at a *specially* fixed double minimum price. All this was done by an *affirmative* statute—one *affirmative* in effect and character.

A *later general* and *affirmative* statute—the act of 1866—employed language in its *indemnity* clause sufficiently *general, if standing alone*, to authorize a selection of the *even sections* now under consideration. But *these* "general

words" may be *restrained* according to their subject-matter—these lands.

As to *these lands* there was, by the act of 1863, a *prior* "*specific provision*" for their sale or preemption at double minimum price or homestead entry in tracts of 80 acres each. This is "*not* repealed or *affected* by the *general words* of a subsequent statute"—the indemnity clause of the act of 1866.

The *appropriation* of these lands for 80 acre homesteads—a right or disposition "*given in particular*,"—shall "*not* be taken away by the *general words* of a subsequent statute"—the indemnity clause of the act of 1866.

All the provisions should be construed together—effect should be given to both; "both should be enforced" according to the subject-matter.

3. The act of 1866 should not be construed as repealing the *special* provisions made by the act of 1863, because this would impute *bad faith* to Congress. The L., L. & G. Co. had a solemn pledge and vested right that these lands should be sold, or taken as homesteads, thus to improve the value of the remaining lands, etc. And it would be bad faith to settlers to deny them the rights assured them by the act of 1863.

V. REASON. ANOTHER CONSIDERATION LEADS TO THE SAME CONCLUSION:

AFTER THE ACCEPTANCE OF THE ACT OF 1863, BY KANSAS, THESE LANDS CEASED TO BE "PUBLIC LANDS."

The act of 1866, in terms, gave authority to select indemnity lands "from the *public lands* of the United States."

This expression "*public lands*," has a fixed, well settled meaning for all purposes of railroad land-grant acts. "Yellow Stone Park" is owned by the United States, and is in *one sense* "public land," but is *not so* within the meaning of *land-grant acts*. The same is true of the *public squares, circles*, and other *lands of the United States* in Washington, and so of *forts, reservations*, and *all other lands* of the United States, which by *Treaty*, or *act of Congress*, have been *pledged, set apart*, or *appropriated to* or *for*, ANY *specified* public or private use.

This was decided in *Holden* v. *Joy*, 17 Wallace, 211; *L., L. & G. R. R. Co.* v. *U. S.*, 92 U. S. 741; *U. S.* v. *McDougall's Adm'r*, 121 U. S. 89; *Five Per Cent. Cases*, 110 U. S. 471; *Kansas* v. *U. S.*, decided by Secretary Lamar, 14 Copp's Land Owner No. 9, August, 1887; s. c., Vol. 6 p.— ; Land Decisions Interior Dept.

In *Newhall* v. *Sanger*, 95 U. S. 768, construction was given to this expression:

Davis, J., said:

"The words "public lands" are habitually used in our legislation to describe such as are *subject to sale* or other disposal under GENERAL LAWS."

The lands now in question were *not subject to disposal under* "GENERAL LAWS." They were appropriated under a SPECIAL LAW,—the act of 1863,—for homesteads only half the size of those authorized by "general laws,"—the general homestead statute—and for sale and preemption at *double the price* fixed by general laws on that subject.

THE CONCLUSION *is inevitable that these lands were not subject to indemnity selection: they were not* PUB-

LIC LANDS—they were not covered by the *grant* or *indemnity* provisions of the act of 1866. If there be *any fair doubt* as to this, it is to be resolved in favor of the United States and against the grant.

VI. REASON. THE ACT OF 1866 WAS NEVER IN FORCE AS TO THESE LANDS. This will be shown hereafter.

THE ARGUMENT IN OPPOSITION TO THIS VIEW CONSIDERED.

JUDGE BREWER'S OPINION IN THE CIRCUIT COURT.

This case comes to this Court on appeal from the decree rendered in the Circuit Court of Kansas by His Honor Judge Brewer, now a Justice of this Court. In his opinion found in the printed record he says:

> I may also add that, in view of the magnitude of the interests involved, there is a certainty that this case will be taken to the Supreme Court for review; hence *extended* discussion on my part of the question is unnecessary.

This of course will be conceded on all hands is correct, and it was wholly unnecessary to give the case *the full consideration* required in this court of last *resort*.

On the *particular proposition* which I have been discussing—THE FISRT—Judge Brewer's opinion says:

> The proposition is, that the act of March 3 1863 making the grant in aid of the L, L. & G Road, *expressly reserved these sections to the United* States, and the act of July 26 1866 *does not repeal the former reservation*, but recognizes and re-enacts the same

> reservation, and also that the act of 1866 is not applicable to these lands. It seems to be conceded by the Supreme Court in the opinion referred to [the Brewster case 118 U. S. 682] *that if these acts are to be treated as* DISTINCT GRANTS *to independent roads*, an argument kindred to this, would have *great force:* but the judgment of that court was that the acts of 1863, 1864 and 1866 were to be taken and construed as *in pari materia* and *with the sole object of building one road.* Putting *that construction* upon these various statutes, and regarding them in the same light, which the Supreme Court seems to have regarded them, the later acts must be treated as rather *supplementary*, than *independent*, and construing in *that way*, the antagonism springing from their reservations disappears. If the latter act [of 1866] merely extends or *supplements* the earlier acts, then they can not be construed as *independent grants* nor as *antagonistic*. In *that view* the *effect which has been given* to these reserving clauses *in* OTHER CASES, ceases to *have operating* force HERE, and this proposition [the first proposition I have been discussing] must also be overruled.

The *italics*, and CAPITALS are mine. And referring to that case [Brewster case 118 U S 682] the learned judge said:

> That case on final hearing [in the circuit court of Kansas] was decided in favor of the Government (25 Fed Rep. 243) On appeal to the Supreme Court the judgment of the circuit was reversed * * 118 U S 682 * * Although such opinion was different from my own, and resulted in the reversal of my judgment, it does not become me to criticise it in the least

The effect of all this is, that in the case now here the circuit court proceeded on the idea that the question now presented was of such importance, as to require a decision by the Supreme Court: that on *the generally accepted* rules for construing the *reservations* in the acts of 1863 and 1866 the proposition under discussion is sustained; that this is recognized by the Supreme Court in the *Brewster case*, but that for reasons stated by the Supreme Court the reservation does not apply in this case.

I respectfully submit that it is very certain that the opinion in the *Brewster case* (118 U. S., 682) is in this case an *authority for the Government*—NOT AGAINST IT.

THE BREWSTER CASE, 118 U. S., 682. AN AUTHORITY FOR THE GOVERNMENT ON THE FIRST PROPOSITION

This is so for reasons *some* of which will now be stated—

I—IT HAS BEEN SO UNDERSTOOD AND CONSTRUED IN THE INTERIOR DEPARTMENT

After Secretary Lamar had decided—as he did June 16, 1886 (4 Land Decisions, 573), that the patents now in controversy were unlawfully issued—an application was made to the Secretary to have the suit dismissed on the ground that it had been in effect decided by the *Brewster case*, 118 U. S., 682.

The acting Secretary on December 17, 1886, refused the application, and said:

> I can find no reason in said decision for modifying the former recommendation for this suit.

And he said of the decision of the Supreme Court:

> So far from militating against the said recommendation the court foreshadows a favorable decision in the case in question [this suit], for after stating the argument based on the above quoted proviso [the reserving proviso in the act of 1866] the court says: "If the Atchison, Topeka & Santa Fe R. R. Co. built a line along the same general course and through the same lands twenty miles in width that the M., K. & T. R. R. Co. has occupied with its road, and asserted a claim to these lands or to *any* of them [the odd sections in the overlapping indemnity lands of the L., L. & G. and M., K. & T. were in controversy], the argument would be almost irresistible."

The Acting Secretary, after quoting this, then says:

> Now this language describes *just the status of the lands in question* as far as they lie in the *granted lands of the L., L. & G. Co.* That company did build its road "through the same lands and asserted a claim to them."

Whatever effect the acts of 1863, 1864 and 1866 had in *unifying* the grants of those acts into one road, and one grant for one road down the Neosho Valley, it left, in the language of the syllabus of the *Brewster case*, "as distinct grants for different roads which may come in conflict in the claims under them in regard to the lands granted"—the conflicting claims for the three roads as distinct roads, to-wit:

1. The L., L. & G. Road with its indemnity limits under the act of 1863.

2. The A., T. & S. F. Road with its limits under the same act; and,

3. The M., K. & T. Road with its claims under the act of 1866.

They were not unified.

The rights of the L., L. & G. and of the A., T. & S. F., for their respective main lines, and the rights of the United States as *reserved* under the act of 1863—the *even* sections—all remained unimpaired by the act of 1866, and expressly reserved.

II. SO FAR AS THE BREWSTER CASE (118 U. S. 682) AFFECTS ANY QUESTION NOW MADE IT IS A DIRECT AUTHORITY IN FAVOR OF THE POSITIONS NOW ASSUMED BY THE UNITED STATES.

That case, related to (1) ODD SECTIONS, (2) in the overlapping *idemnity limits* of the M., K. & T. Road and of the L., L. & G. Road, that is, in the *common indemnity limits of the two roads.*

This case relates to EVEN SECTIONS—all within the *indemnity* limit of the M., K. & T. Road, *part* within the GRANTED LIMITS of the L., L. & G. Road, and part within the *common indemnity limits of the two roads.*

In that case, the court passed on *three points* made by the United States against the title of M., K. & T. Road, *two* only of which it is material now to consider. One point was:

1. That the act of 1863 made a *subsisting* grant to the A., T. & S. F. Co. for a "BRANCH ROAD" from Emporia southward, *which covered the lands in dispute*, and that the act of 1866 expressly reserved *these lands* from its indemnity rights, *because the same lands were covered by the branch road grant of the act of* 1863.

Thus the court says:

> As the lands granted by the prior acts of 1863 and 1864 had, by the act of the legislature of Kansas, been granted to the Atchison, Topeka & Santa Fe Railroad Company, a then existing corporation of that State, for the purpose of building a road, with the same general description as to its course down the valley of the Neosho River, *which might have run through these same lands* IF IT HAD BEEN BUILT by the latter company, it is argued with great earnestness that these lands were necessarily reserved, under this clause of the act of 1866, from the grant, as being reserved by the authority of Congress for the purpose of aiding in that object of internal improvement. If the A., T. & S. F. R. R. Co. *had built a line of road along the same general course* and *through the same lands, twenty miles in width*, that the M., K. & T. R. R. Co. *has occupied with its road*, and asserted a claim to these lands, or to *any of them*, the argument *would be almost irresistible.*
>
> If, at the time that the act of 1866 was passed, the A., T. & S. F. R. R. Co., or *any other company than the one to which the grant of* 1866 was made, was *intending to build a road*, or *expected to build* one, or had *any authority from the State of Kansas to build* one, under the acts of 1863 and 1864, *the argument would have force.*

The court in effect said that the legislation and proceedings under it *as to this* "BRANCH ROAD" down the Neosho Valley gave to the M., K. & T. Co. *all the rights* of the acts of 1863, 1864 and 1866, and *hence* the objection was not well taken.

But the court in effect said that *if* the grant of 1863 for a branch road had been *subsisting*, as *distinct from the grant*

for a road down the valley by the act of 1866 "the argument would have great force."

The court further says that:

> If the A., T. & S. F. (1) was intending to build a road, or (2) expected to build one, or (3) had any authority to build one under the acts of 1863 or 1864, the argument would have force.

And the syllabus condenses the argument of the court by saying:

> The acts of Congresse of March 3, 1863, July 1, 1864, and July 26, 1866, granting lands to the State of Kansas for railroad purposes, are to be construed *in pari materia*, and as having the one purpose of building a single road from Fort Riley, down the Neosho Valley, to the southern line of that State, and not as distinct grants for different roads, which may come in conflict in the claims under them in regard to the lands granted.

This concedes—it distinctly holds—that if the acts of 1863 and 1866 made *"distinct grants for different roads"*—then the act of 1866 would have operated to *reserve* from *its granted* or *indemnity rights* ALL the lands affected by the act of 1863. It is a direct authority in favor of the claim we now make, that the act of 1866 cannot give any lands as indemnity which *are in any way reserved or affected by the act of* 1863, *in its relation to the L., L. & G. Road, either* within the granted *ten mile limits* or within the *twenty mile indemnity* limits of that Road. These acts made "distinct grants for different roads"—that is, for the L., L. & G. and the M., K. & T.

The court held that the acts of 1863, 1864 and 1866 superseded the Emporia branch—unified the grants—

> as having the one purpose of building a *single* road from Fort Riley down the Neosho Valley to the Southern line of that State, and not as distinct grants for *different* roads, which may come in conflict in the claims under them in regard to the lands granted.

Thus the court held on the point made by the United States—that there was one grant with indemnity rights for the Emporia branch by act of 1863, and this so appropriated the lands, that they could not be taken for a road under the act of 1866.

But the court say that:

> If the A., T. & S. F. R. R. Co. had built a line of road along the same general course and through the same lands twenty miles in width that the M., K. & T. Co. has occupied with its road, and deserted a claim to these lands or to any of them, the argument would be almost irresistible.

That is, when Congress makes a grant for one road [the L., L. & G. Ry. act of 1863] with granted and indemnity limits, and subsequently makes a grant for another road the [M., K. & T. Ry. act of 1866] with granted and indemnity limits, and there is a conflict in the common indemnity limits, the first act appropriates the alternate reserved sections, and the second act reserves them from the operation of the last named act.

The same matter may be stated in other words substantially as follows:

THE *Brewster* CASE (118 U. S. 682) RELATED TO ODD NUMBERED SECTIONS ONLY, and these were:

1. NOT WITHIN THE 10 MILE GRANTED LIMITS OF THE L. L. & G. ROAD, AS PART OF THE LANDS NOW IN CONTROVERSY ARE, BUT

2. WERE WITHIN THE 20 MILE INDEMNITY LIMITS OF THE L. L. & G. ROAD, AND OF THE M. K. & T. ROAD.

AS THOSE WERE ODD SECTIONS ONLY, the "RESERVING CLAUSE" OF THE ACT OF 1863 IN ITS RELATION TO THE GRANT FOR THE L. L. & G. ROAD, DID NOT APPLY TO THEM, AND NO QUESTION WAS, OR COULD BE MADE, IN THE *Brewster* CASE AS TO THE EFFECT OF THE RESERVING CLAUSE ON THE ALTERNATE EVEN RESERVED SECTIONS.

THE ONLY QUESTION DECIDED WAS THAT THE M. K. & T. CO. HAD ACQUIRED BY THREE ACTS OF CONGRESS, of MARCH 3 1863, JULY 1, 1864, AND JULY 26, 1866, AND BY AN ASSIGNMENT FROM THE A. T. & S. F. R. R. CO. AND THE L. L. & G. R. R. CO. ALL RIGHTS OF ALL THE *Companies* TO SUCH SECTIONS

The question decided was one of alleged conflict BETWEEN GRANTS, *not as now*, OF A *conflict between* A RESERVATION OF EVEN SECTIONS, *by the "reserving clause" of the act of* 1863, *and a later indemnity clause under the act of* 1866 *which neither* EXPRESSLY, *nor by any fair implication repeals the prior reservation.*

Reference will be hereafter made to the *Brewster case.*

REPLY TO THE ARGUMENT FOR DEFENDANTS IN THE CIRCUIT COURT ON THIS SUBJECT.

As the argument for defendants is not yet filed in the Supreme Court, we can not anticipate what position may be taken as to the effect of the "reserving clause" of the act of 1863, on the *reserved even sections* within the 10 mile or granted limits of the L. L. & G. Road.

The substance of what was understood to be said in argument, in the Circuit Court on this subject was:

(1) That the act of 1863 does not reserve the even sections, and

(2) That the act of 1866 does not limit selections of indemnity land as in other acts, to *odd* sections.

(3) That *hence* as to these *even* sections the act of 1866 abandons or changes the "policy of alternation."

This seems to have been sufficiently answered, and we respectfully submit that it has been shown:

1. That the act of 1863 *does expressly reserve* these *even* sections for specified purposes from *future grant*, or *indemnity selection*, and the reservation is *repeated* and *reaffirmed* in the act of 1866;

2. That the act of 1866 does *not expressly* or by *any fair inference*, repeal the reservation in the act of 1863, but as just stated re-enacts and reaffirms it, and

3. That this view is sustained by the *Brewster* case—

To all this it may be added:

4. That there is abundant scope and purpose for the application of the indemnity selection clause of the act of 1866, by applying it to even sections *outside of all railroad land grants*.

5. Finally, on this point, if there be any *reasonable doubt* as to indemnity rights in the alternate reserved even sections within the granted 10-mile limits, it is to be resolved against the right to select them.

AS TO THE EVEN SECTIONS IN THE COMMON INDEMNITY LIMITS OF THE M. K. & T. AND THE L. L. & G. ROADS.

These lands were not subject to indemnity selection in favor of the M. K. & T. Co.

This view is supported by several reasons and considerations:—

I. REASON. THE BRIEF BUT FORCIBLE OPINION OF THE SECRETARY OF THE INTERIOR, AS FOUND IN VOL. 4 OF LAND DECISIONS, 576, AND ITS REAFFIRMANCE AS FOUND IN VOL. 5, PAGE 280, AND THE LONG LINE OF DECISIONS, AND THE USAGE OF FORTY YEARS ALREADY REFERRED TO, ARE SUBMITTED AS A CONCLUSIVE ARGUMENT. These are supported by the concurrence of the Attorney General, in deeming this suit advisable.

II. REASON. THE ACTS OF 1863 AND 1866 EXPRESSLY, OR BY CLEAR INFERENCE, RESERVE THESE LANDS FROM INDEMNITY SELECTION.

The act of 1863 has its indemnity provision in these words:—

> But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by

> the United States for any purpose whatever, then it shall be the DUTY OF THE SECRETARY OF THE INTERIOR TO CAUSE TO BE SELECTED FOR THE PURPOSE AFORESAID, from the public lands of the *United States* nearest to tiers of sections above specified, so much land in *alternate sections* or part of sections, *designated by odd numbers*, as shall be equal to such lands as the United States have sold, RESERVED, or *otherwise appropriated*, or to which the right of pre-emption or homestead settlement have attached as aforesaid.

Thus the act of 1863 expressly says that the Secretary of the Interior may select *odd* sections for indemnity purposes, but equally *in effect* says he *shall not select the even sections*. The statute in effect says the *even* sections shall be *disposed of under the homestead laws*. This is the *effect* upon that act, of the *general* laws in relation to homesteads and pre-emptions. They were as much a part of it, as though incorporated in it. The result claimed is not a *mere inference* from the act of 1866, but if it were so, *an inference arising from a statute is as much a part of it, and is as forcible law as if incorporated therein in express words.*

In *U. S.* v. *Babbit*, 1 Black, 61, a question was raised as to the effect of a *proviso* to the act of March 3, 1853 (10 Stat. 244), as to the amount of fees of certain officers. It was insisted that by its terms it was limited to officers then in office. The Court said:

> If this were so, the result claimed would not necessarily follow. In that case we should find no difficulty in holding it to be *clearly implied*, that the same

> rule of compensation should apply to their successors as to the incumbents. *What is implied in a statute*, pleading, or contract, or will, *is as much a part of it as what is expressed.* * * A thing which is within the *intention* of the maker of the statute, *is as much within the statute* as *if it were within the letter.*

This is reaffirmed in *Gelpeck* v. *Dubuque*, 1 Wallace 220, and numerous authorities are cited in both cases.

It follows that the *even* sections were by the act of 1863 *reserved* to the United States; they were by statute appropriated for homestead and pre-emption settlement; this was a part of the land grant policy, on the faith of which the State of Kansas accepted that act, and thereby agreed to build the L. L. & G. road.

Then the act of 1866, in view of all this, affirms the reservation by saying:

> *Provided*, that any and all lands *heretofore reserved* to the United States by any act of Congress * * for * *any purpose whatever* be and the same are *reserved and excepted from the operation of this act.*

This irresistibly reserves these lands from indemnity selection, unless rules of law applicable in all other cases do not affect Railroad Companies in their claim to indemnity land.

III. *The same result follows from the policy of alternation established by the land grant system; that is, the policy of reserving alternate sections for settlers.*

At an early day in our system of land grants the same question now made arose, both as to indemnity selections for one road within the granted limits of another, and

within the common indemnity limits of both. Both questions were decided in accordance with the claim we now make.

The act of May 17, 1856, (11 Stat. 15), granted to the State of Alabama, for the Montgomery & Pensacola road, lands *in place*—

> Every *alternate* section of land designated by *odd* numbers, for six sections in width on each side of said road.

It authorized the State to select, subject to approval by the Secretary of the Interior, as indemnity lands—

> From *the lands of the United States*, nearest to the tiers of sections above specified, so much lands in alternate sections or parts of sections as shall be equal to such lands as the United States have sold, or otherwise appropriated, etc.
>
> Provided: That the land to be so located shall in no case be further than fifteen miles from the lines of said roads.

It provided that the reserved sections within the six mile limits should "not be sold for less than the double minimum price of the public lands when sold."

The lands within the indemnity limits were left to the operation of the general law as to sales.

It is thus shown that the indemnity selections were to be taken "from the lands of the United States," between the six and fifteen mile limits—that is, the State might select *either odd or even sections* for indemnity.

The subsequent act of June 3, 1856 (11 Stat. 17), made a grant similar in all its provisions for the Girard & Mobile road.

The two roads were so constructed that the *indemnity limits overlapped*.

The State first selected under the first act as indemnity lands for the Montgomery & Pensacola road, the *odd* sections within this overlap. It is to be observed, that when the act of May 17, 1856, was passed, the overlap had not been created, so that the selection it authorized disturbed no previous right. Subsequently, the State, under the second act, selected the *even* sections *within the overlap* for the Girard & Mobile road.

The two acts gave the right to select as indemnity lands the requisite amount "in alternate sections" either odd or even. Thus by the clear, exact, *general* words of the two statutes, the State might select odd sections for one road, and even sections for another, or odd sections at one place and even sections at another, for either road or for both. Thus adhering to the letter of the statutes—their general words—in an overlap, the even sections might be all selected for one road and the odd sections for the other, thereby taking *solid blocks of land, leaving none for sale* or settlement.

It seems that the two roads crossed each other or approached so close that there was an *overlap* also *in the six mile limits*. No claim, however, was made of a right to select indemnity lands for the second road within the six mile limits of the first.

The Secretary of the Interior—Secretary Thompson—on the 28th of October, 1859, decided that the second selection by the State was unauthorized, and in doing so, discussed the right to take indemnity within both the overlaps.

AS TO GRANTED LIMITS.

As to the right to select indemnity lands under the latter act, where its indemnity limits overlapped the six mile limits of the first road, he said:

"If Congress, on the 3d of June [by the act of June 3, 1856], had in view the crossing, or near approach of the two roads, it is at once noticeable that, that body made a grant of odd numbered sections in both cases, *thereby excluding any claims to even numbered ones within the limits of the grants in place* * * *

"It is an appropriate remark here, that Congress, in making grants to several of the States, to aid in the construction of railroads, has kept in view *some advantages*, to result to the Federal Government, from the location and completion of the roads. The value and saleableness of the remaining adjacent public lands, is one of these objects. Accordingly, the minimum price of the reserved lands within six miles of the roads is doubled by *special* provision of law.

The act of May 17, 1856, granted the odd sections within six miles of the Montgomery & Pensacola road, and declared "that the sections * * which, by said grant *remain to the United States* within six miles * * shall not be sold for less than double the minimum price."

It is thus seen that the act of June 3, 1856, gave authority in *general* terms sufficiently comprehensive, if standing alone, to select for indemnity the *even sections* within such six mile limits.

So here the act of 1863 granted the "*alternate*" sections within ten miles of the L., L. & G. road, and de-

clared "that the sections * * which, by the aforesaid grant *shall remain in the United States* within ten miles * * shall not be sold for less than double the minimum price."

Here are two cases precisely alike. The *same reasons* which deny the right of selecting even sections as indemnity within the six mile limits in Alabama, deny the right to make indemnity selections within the ten mile limits here.

The *general* words of the indemnity clauses are restrained according to the subject matter. The *special* provisions *for sale* are "not repealed or *affected*" by the general words of indemnity clauses. Both may stand together and *both be enforced* according to their respective subject matter.

The indemnity clause does not nullify the declaration that the even sections within the granted limits "remain to the United States," and providing that they shall be sold in a *special mode*.

The *express* grant of every odd section within six miles, is equivalent to a declaration that the even sections shall not be in any manner taken. *Expressio unius exclusio alterius*.

In the Alabama case the statutes required indemnity selections to be made "from the lands of the United States * * in *alternate* sections," but the decision against the right to select indemnity lands for one road within the six mile limits of another is not in any sense placed upon this provision.

And the act of March 3, 1863 (12 Stat. 772), gives indemnity only "in *alternate* sections or parts of sections

designated by odd numbers" and hence, as Secretary Lamar decided, the act of 1866 expressly reserved the even sections to the United States.

A construction of the acts of 1863 and 1866, which would give the even sections now in question for indemnity lands, would be a complete subversion of this whole policy.

It would, for the *first time,* as it is believed, give *double minimum* lands for indemnity. It would, for the first time, donate *solid blocks* of land from 20 to 40 miles wide, with none reserved to be enhanced in value for government sale.

It would, for the first time, absolutely *shut out* homestead settlers from whole counties of land.

Statutes are frequently construed directly against their words, when it be necessary to give effect to the real policy, purpose and intention of Congress. *Silver* v. *Ladd,* 7 Wall., 219; *Brown* v. *Somerville,* 8 Md. 444.

THE CONCLUSION INEVITABLY FOLLOWS THAT THE EVEN SECTIONS IN QUESTION *were not subject to indemnity selections, but are subject to homestead entry.*

SECRETARY THOMPSON'S DECISION AS TO LAND IN THE COMMON INDEMNITY LIMITS OF TWO ROADS.

Secretary Thompson held that the acts of Congress construed *in pari materia,* established the *policy of alternation,* and he said:

> Accordingly, the minimum price of the reserved lands within six miles [the granted limits] of the roads, is doubled by *special* provision of law. That the market *value* and *saleableness* of the lands *beyond*

that limit, and for at least nine miles further [the indemnity limits] from the line of the roads are enhanced, is as directly a *consequence*, and *plainly an object of the grants* as the increased value of the reserved lands within the six miles limit. For such increased market value, and saleableness of the lands beyond that limit, an earlier sale results. The lands fall less under the effect of the graduation law, and the Federal Treasury, not only receives more money and *earlier payment* for the lands, but saves something in the salaries and expenses of the officers, necessarily employed in effecting the sales.

It is also to be observed, that the selections for indemnity, under both grants to Alabama, are subject to the approval of the Secretary of the Interior. Now, should I construe the act of the 3d of June, 1856, as a grant of lands, which Congress had excepted from the operation of a prior grant to the same state, and as a *relinquishment, in part, of the advantages which Congress sought to secure* to the Federal Treasury in the provisions of both grants, I should waive an adherence to that *general fairness of dealing*, which ought to be observed by the state and by the United States in adjusting the grants. This I could not consent to do, and I therefore decline to recognize the claim of the state to sections of the even numbers, within limits where she has already received the odd numbered ones, or *vice versa*. * *

The acts of May 27, and June 3, 1856, authorized indemnity selections,

> From the lands of the United States, nearest to the tiers of sections above specified, so much land in alternate sections.

Thus the selection was not limited to either odd or even sections. And Secretary Thompson accordingly said:

> Now I am not *prepared* that the choice of *odd* numbered sections by the state as indemnity for the use of one railroad, will preclude her from choosing even numbered sections for the use of another railroad [where there is no overlap in the indemnity limits]; but I am of the opinion that she cannot have, by selection, any even numbered sections or parts of sections, where she has already obtained the odd numbered ones,—for this destroys the alternation which the act of the 3d of June, 1856, requires, shall be observed in setting apart the lands that have been granted to the states.

Now, it is *absolutely certain*, that the act of 1863, establishes the *policy of alternation*. It does so in clearer, stronger words than the acts of May and June, 1856, because it limits the selections to *odd* sections, *eo nomine*, and it in effect *specially* "appropriates" the *even* sections for homesteads and for sale. When the system of *alternation* is thus, by the act of 1863, *established*, it can not be changed in favor of the M. K. & T., unless the act of 1866 in practical effect *quoad* the even sections, repeals the act of 1863. When the *law of alternation* is established by the first act, it is not necessary to repeat it in the second. The sole question is—has the second act repealed the first *pro tanto?*

Such repeal, as already shown, would impute to Congress monstrous bad faith, in fact a palpable fraud on the settlers, a fraud on the L. L. & G. Co., a fraud on the government and people.

In the case of the Alabama roads, Secretary Thompson met the claim that the second statute in terms gave a right to select even sections as alternate sections, by saying:

> I do not think that the claim now before me, is strengthened by a consideration of the fact, that it arises under another and later act of Congress, than that by which the grant for the benefit of the Montgomery & Pensacola road was made, for if Congress, on the 3d of June, had in view the crossing, or near approach of the two roads, it is at once noticeable that, that body made a grant of odd numbered sections, in both cases [as congress did by the acts of 1863 and 1866] *thereby excluding any claim to even numbered ones within the limits of the grants in place.* The *policy* of Congress [the intention of the acts] in thus excluding from the *later grant* the *alternate* sections which *remained to the United States* within the six miles [granted] limits of the former, being thus *so patent*, I cannot doubt that *the intention* as well as the *legal effect* of the action of that body, was to *retain as the property of the government*, the alternate tracts that lie between the six and fifteen miles [indemnity] limits of either or both roads.

The question does not arise as to what lands may be selected as indemnity under the act of 1866, where there is no *overlap*. But where, as in this case, the *overlap* exists, the reservation is perfect.

The *autonomy* of the land grant system requires the construction stated.

That system has a history, commencing with grants for canals and turnpikes a quarter of a century before the era of railroads.

The railroad land grant system commenced with the act of September 20, 1850. 9 Stat. 466.

All the grants and indemnity selections have been substantially of *alternate sections*. The policy of grants was first justified on the grounds, that (1) cheap transportation would be thereby secured, *and* (2) that the government would lose nothing, because the reserved sections were rendered more saleable, and were increased in value as they were in selling price, from $1.25 an acre to $2.50. The *bounty* was thus not really from the public resources, *but from the men who bought the lands.* It was said in Congress, that these grants were *not* donations. Indeed, the constitutional power to make donations pure and simple was denied. The whole system proceeded on the theory that the government received *full consideration* for all lands granted.

Railroad companies received lands of but *little value;* as a consideration therefor, they constructed roads, and enhanced the value of the reserved government alternate sections. This policy of compensation and alternate sections, has never been departed from; even after the homestead act was passed in 1862 its policy was regarded as so wise and just that the reserved alternate sections of the government, were by the Railroad granting acts *specially* "appropriated" for 80 acre homesteads.

Thus the whole system has kept in view alternate reserved sections, either as *compensation*, or to secure homesteads, which brought taxation and so compensation besides the improvement of the country with increased political power.

The general policy established by the land grant acts of reserving alternate sections to the government, was discussed with great ability by Britton & Gray in 1883 before the Secretary of the Interior on an application for instructions to the Commissioner of the General Land Office under the act of 1863, in aid of the A., T. & S. F. R. R. Co. In discussing the indemnity and reservation clause of the act, and referring to the act granting lands to Illinois, &c., it is said:

> The subject of *reservations* was never mentioned in debate [in Congress] except on the Illinois bill. There certain lands had been reserved to the United States, along the canal from the Illinois river to Lake Michigan, the balance having been granted to the canal. *The branch road, provided for in the bill, ran near to and parallel with this canal. If the State were allowed now, to select the alternate* even sections for the railroad—having heretofore selected the alternate odd sections for the canal—the government would have no lands left to be enhanced in value. It would get no consideration for its grant. This it was claimed would violate the principle on which the bill must rest, *and the proviso was added* * * *.

Thus the history of land grant legislation shows that the purpose of the *proviso* was to create the policy of alternation.

The effect of the acts of 1863 and 1866 is, substantially, the same as if they read thus:

> *Be it enacted, etc.*
>
> The L. L. & G. R. R. Co., shall have a right to select every *alternate* section designated by odd numbers as indemnity lands, and they are *appropriated* and *reserved* for this purpose, the intention of Con-

gress being (1) to aid said company in constructing and *maintaining* its road, (2) to induce *settlement* on the even sections reserved, thus *enhancing the value* of other lands granted to said company, and (3) making business for its road, thereby benefitting it; (4) thereby benefitting *settlers*, and (5) by all these means benefitting the government by securing a *speedy sale* of the even sections, or still more, by inducing portions of them to be taken for homesteads, for which purposes all said even sections are specially "appropriated" and reserved to be taken not under *general* laws, but by *special* provisions herein as homesteads in *alternate* and not in *all* sections as fixed by general laws.

Provided: That said R. R. Co., shall not for ten years be divested of the privileges herein given, and that in the meantime no other disposition of any odd or even sections shall be made, and "the lands [then] unsold shall revert to the United States." [Act 1863, Sec. 5, proviso.]

If it be said, this theoretical *revision* includes *inferences*, it is also to be said it embodies the meaning of existing laws. The intention of a statute is the *law*. And an inference arising from a statute is as *forcible law* as an express provision. *Gelpcke* v. *Dubuque*, 1 Wall., 220; *U. S.* v. *Babbit*, 1 Black, 61.

It may be more than doubted whether Congress intended SOLID BLOCKS OF LAND to be taken *any where*, by a selection of both odd and even sections. But if so, *there was ample scope for the exercise of such right as to lands not already enhanced in value by prior grants or prior roads. There was ample room to give the act full effect without encroaching on the general policy of the land*

grant system, and especially without doing so within prior granted or indemnity limits involving bad faith and fraud. Accordingly the act of 1866, *in giving the right to make indemnity selections, was* DEALING WITH LANDS GENERALLY, *lands* NOT PREVIOUSLY SUBJECTED TO EVEN INCHOATE INDEMNITY RIGHTS—*lands where it was lawful, without bad faith, to select both odd and even sections.*

If, therefore, Congress did not intend to give the M., K. & T. Co. a right to select odd sections, which might under any circumstances, interfere with the previous right given to the L., L. & G. Co., it will follow inevitably *that the act of* 1866 *had no effect within the overlapping indemnity limits* It only extended to places where it would be lawful to select either odd or even sections, or both.

In *K. P. R. R. Co.* v. *the A., T. & S. F. R. R. Co.*, 112 U. S. 414, a claim by one company to indemnity lands within the granted, and within the indemnity limits of another company was denied, though on somewhat different grounds.

THE ACT OF JULY 26, 1866, DID NOT AUTHORIZE THE SELECTION OF ANY EVEN SECTIONS OF LAND AT ANY PLACE FOR INDEMNITY.

This question is substantially decided in the Brewster case, 118 U. S., 600. In that case the court refer to the acts of March 3, 1863 (12 Stat., 772), July 1, 1864, (13 Stat., 339), and July 26, 1866 (14 Stat., 289), and say that Congress:

> Did *not* intend to have two parallel roads for a long distance within the narrow strip of the Neosho

> valley, but *did* intend by *all this legislation* to secure *one road* * * The several statutes are to be taken and construed as in *pari materia*, and the ONLY object was the building of *one road*. By the act of 1866 there was no grant in aid of any other road but *that one*. If the act of 1866 is, as we suppose, *supplementary* to the acts of 1863 and 1864, the description of the route of the road and its terminus in the later act, is the one which must govern the grant of lands.

The *whole case*, according to the opinion, shows that the purpose of Congress was not to *make a new grant*, but to *ratify in the M. K. & T. Co. the rights it had acquired by the assignment of March 9, 1866 from the A T & S F Co and under* which as the court says the M K & T Co.

> Assumed all the obligations of the former [A. T. & S. F. Co] in regarded to building the road which that company had assumed in accepting the grant by the State of Kansas, in consideration of which the A. T & S. F R R Co assigned to the [M K & T Co] *all its right* title and interest in the lands appropriated to the building of that road by the acts of March 3 1863 and July 1, 1864

That assignment of March 9, 1866, was *invalid, unless approved by Congress* (*Coe* v. R. R. Co., 10 Ohio St. 372). The act of 1866 as the opinion in the Brewster case shows simply *ratified it, unified* the grants into and for *one road*, with the same rights in the M. K. & T. Co. *formerly held* by the A., T. & S. F. under the acts of 1863 and 1864.

The purpose of the act of 1866 was not to make a *new grant, not* to *enlarge* indemnity rights, but in referring to *indemnity land* it *had reference to the indemnity lands mentioned in the acts* of 1863 *and* 1864, and NO OTHER.

The opinion in the *Brewster Case*, referring to the view that the object of all the acts was to unify in the M., K. & T. Co. all the rights previously granted under the acts of 1863 and 1864, so far as *this road* was concerned says:

> In *support of this view* it will be seen that, in the *later* act of 1866, Congress departing from the principle of the former acts of making the grant *directly to the State*, without prescribing by what means, or by what corporations it should construct the road, declares expressly that the grant is made to the State of Kansas for the benefit of the U. P. R. R. Co. Southern Branch [M., K. & T. Co.] and it *did this obviously for the purpose of consolidating all these grants into one grant in the hands of that company*, which already had all the rights vested by the other statutes necessary to enable it to build this road down the Neosho Valley.

There was no *reason* for enlarging the grant and no motive for it. When all the statutes are taken together the purpose is shown to have other objects, not one of which required an enlargement of indemnity rights. To apply the indemnity clause of the act of 1866 beyond this is to invoke the censure of the maxim *qui haeret in litera haeret in cortice*.

If the act of 1866 was SUPPLEMENTARY to the act of 1863 to *save to* the M. R. & T. Co *the earlier land* grant rights of the act of 1863 against settlers, why is it not *supplementary also* to fix *indemnity rights* precisely as they were under the act of 1863. If it was *supplementary* to save *previous* rights to the M. R. & T. Co., why was it

not supplementary to save to the United States its rights to *even* sections, as under the act of 1863.

This view will reconcile the acts as one *in pari materia*, and will not subvert the "policy of alternation" maintained in all other land grant acts.

If the three acts were *in pari materia* for the purpose of saving prior rights to this Railroad Company why are they not *in pari materia* to preserve the rights of the United States and of settlers?

THE CONCLUSION *is inevitable that the act of July 26 1866 did not give any authority to select any even sections at any place for indemnity.*

THE CONCLUSION *is inevitable, as I respectfully submit, that the act of March 3, 1863, expressly "reserved" from grant or indemnity selection the* EVEN SECTIONS *within the 20 mile indemnity limits of the L. L. & G. Road, and this reservation was repeated and reaffirmed in the act of July 26, 1866.*

REPLY TO THE ARGUMENT FOR DEFENDANTS ON THIS SUBJECT.

First as to even sections within the common indemnity limits of the L. L. & G. and the M. K. & T. Road.

I. The learned and able argument for defendants in the Circuit Court assumed that:

> The [reserving] *proviso* in the act of 1866 refers to a reservation made by some affirmative act changing the *status* of the land. The act of 1863 is as innocent of any reference to these lands as the multiplication table or the Declaration of Independence.

It says:

> These even sections like the adjoining even sections outside the twenty-mile limits were subject to homestead in quantities of 160 acres or pre-emption at a dollar and a quarter an acre."

Ergo—the *status* of *these* lands was not changed either by the act of 1863, or by the act of 1866—

REPLIES.

Sufficient replies to this are:

1 The *status* of these even sections *was changed* by the act of 1863

The *effect* of that act was precisely as if it had said:

> SEC. 1 *Be it enacted:* That the alternate *odd* sections within the twenty-mile limits *are* on the proper conditions subject to indemnity selection.
>
> SEC. 2. That the alternate *even* sections are *reserved from indemnity selection*, in order "*to preserve the policy of alternation*" with a view, (1) that *these sections shall be sold to reimburse the United States* for the gift made of the odd sections, and (2) to encourage homestead and preëmption settlement for the *benefit of settlers*, (3) to *secure taxable property for Kansas*, and (4) make business for the L. L. & G. Road.
>
> The STATUS of these lands is accordingly made different from the *status* of the odd sections.

The act of 1866 then in effect read *as to these lands*:

> *Be it enacted*, That these lands having been by the act of 1863 reserved for the purpose of preserving "the policy of alternation," and to promote settlement by homestead and preëmption claimants they are hereby reserved and excepted from the operation of this act.

Thus the *status* of these lands was changed,—it was changed by a prospective location and construction of railroad.

It was *changed* by a contingent right in the Railroad Co. to select the *adjoining* odd sections for indemnity.

It was changed by a *pledge* that the *even* sections *should never* after the act of 1863 be subject to Railroad *monopoly*.

2. The *reservation* by the act of 1863 and by the act of 1866 applies wholly without reference to the question whether the *status* of the even sections for homestead and preemption purposes was changed or not.

How does this question affect or defeat the *irresistible* force of the *reserving* clauses?

The *reserving* clauses were based on a *wise policy*, and no court can ignore either the *effect* of the *reserving words*, or the *policy* which dictated them.

3. Finally on this point any *fair doubt* as to the question whether the act of 1866 gave these lands away as a gift, is to be construed against the gift.

II. The argument for defendants says "the decision of Secretary Thompson is no authority for many reasons."

1:—It says the decision—

> "Was made at a time when the department still erroneously held that a grant of *indemnity lands*, and *lands in* place stood on the same footing as to the *time* the grant attached.

2. Int. Dept. Land Decisions, 528, citing Ryan *v.* Central Pacific R. R. See St. Paul R. R. Co. *v.* Winona, 112 U. S. 723.

THE REPLY.

It is sufficient to say in *reply*, no evidence is presented that Secretary Thompson held any such erroneous opinion, and if he did, it "is as innocent of any" effect on THE question now being discussed "as is the multiplication table or the Declaration of Independence"

2—The argument for defendants says:

> The Secretary [Thompson] refused the application for *even* sections, because the *odd* sections had *already been selected*, and not because the act under which they had been selected bore prior date.

THE REPLY.

A sufficient reply is: The Secretary refused the application because the first act of May 17 1856 (11 Stat 15) *established the policy* of *alternation* and *reserved alternate sections from indemnity selection*—precisely as in this case *the act of* 1863 *effects* the *same object*.

And in *neither* case, did the later act *repeal* the reservation—

III. The argument assumes that under the act of July 26, 1866, *all* "lands in *place*, as well as *indemnity* lands would *necessarily* pass in *solid block*."

THE REPLY.

This assumption has been already sufficiently answered.

IV The argument for defendants says:

> The selections of even sections within the common indemnity limits, were made April 14 1873, July 29, 1874, and November 7, 1876. A very consider-

able portion of the L. L. & G. road was not completed within the ten years or at all: consequently *at the date the selections of these lands were approved*, and at the date whereon they were patented, the act of 1863 *had ceased to have any operation*, either contingent, prospective or otherwise, within indemnity limits, even upon *odd* sections, *so far as related to the* L. L. & G. road.

And it is said the forfeiture act of July, 1876, was unnecessary. 2 Land Dec., 528.

REPLY.

By the act of March 3, 1863, the L., L. & G. Company acquired a *contingent* right to make its road and select the *odd* sections as indemnity. This right continued by the act for ten years to March 3, 1873, and thereafter until the forfeiture act of July 24, 1876 (19 Stat., 101):

Schulenberg v. *Harriman*, 21 Wallace, 44; *Cross* v. *Carson*, 44 Am. Dec., 754.

While that contingent *right was subsisting*, and while said act of 1863 *reserved the even sections from any subsequent grant or indemnity selection*, the act of July 26, 1866, was passed *expressly reaffirming all the prior reservations*.

Thus no rights were given by the act of 1866 to the M., K. & T. Co. except such as it was *then* possible to assert so *far as the even sections* were concerned.

If we concede—as in *this* case we should not—that as to the *indemnity odd* sections in the overlapping indemnity limits of the two roads the company *first completing its whole line of road*, and *first making indemnity selections* of odd sections would gain priority (*St. Paul R. R. Co.* v.

Winona, 112 U. S., 723), yet as *the act of* 1863 reserved the *even* sections "to the United States," they continue reversed under the act of July 26, 1866.

If the M., K. & T. Co. by its greater speed received priority over the L., L. & G. Co. in the odd indemnity sections it could acquire no right as to EVEN *sections, because the L., L. & G. Co. could acquire no such right.* The act of 1863 *did not reserve priority as between the two Companies as to odd sections, but in shutting out the L., L. & G. Co. from any EVEN sections for indemnity it equally* shut *out the M., K. & T. Co. from any even sections alternate to the odd sections.* THE CONCLUSION *is inevitable that the M., K. & T. Co. never had any lawful claim to the* EVEN *sections.*

IV REASON.

And this leads to the *fourth* and last *reason*, why the M. K. & T. Co. has no claim on the *even* sections, either *within* the *granted limits* of the L. L. & G. Road, or within the *overlapping indemnity* limits of the two Roads—as follows:

THE ACT OF JULY 26TH, 1866 WAS NEVER IN FORCE OR APPLICABLE TO LANDS BETWEEN EMPORIA [THE A., T. & S. F. CROSSING OF THE NEOSHO] AND THE POINT WHERE THE M., K. & T. ROAD CROSSES THE L. L. & G. ROAD. The lands involved in this case lie along this part of the road.

The Supreme Court has held that the act of 1866 was passed with a knowledge that the A., T. & S. F. Co. had, on March 9, 1866, assigned its rights to the *Neosho or Emporia branch*, to the M., K. & T. Co.; that the assignment was

ratified by the Kansas Joint Resolution of February 26, 1867; and that thus the M. K. & T. Co. as to *this portion of the road* acquired the land grant right of *the branch* under the act of 1863 at and for a continuous line of road. *Brewster Case*, 118 U. S. 682. By *this construction* it secured the *early land grant rights of the act of* 1863 *as against settlers on odd sections after that date—a great advantage* to it over any grant which otherwise *the act of* 1866 *could make*.

But the court has *not* said, that on *this portion* of the road the act of 1863 ceased to be operative in its land grant effect, or that the act of 1866 did or could repeal, enlarge or add to the land rights given by the act of 1863, or was applicable to this portion of the road.

On the contrary, the court in effect held that the act of 1863 was the ONLY ACT which for *this portion* of the road, gave such rights. Thus the court said of the "assignment":

> So far as the two railroad companies themselves [the A., T. & S. F. Co., and the M., K. & T. Co.] could make such assignment, the U. P. R. R. Co., Southern Branch, [now M., K. & T. Co.,] to whom the grant of 1866 was made, had *before the passage of that act*, become possessed of all the rights existing under the acts of 1863 and 1864 with regard to building a railroad *down the Neosho Valley*. [The branch from Emporia southeastward].

The court then says:

> The state did ratify this transfer by the one company to the other.

The court refers to rights given by the act of 1864 "with regard to building a railroad *down* the Neosho val-

ley." The act of 1864 gives no right to lands *south* of Emporia—"down the Neosho valley"—hence the only rights to land down the valley south of Emporia are those given by the act of 1863. And the court referring to the act of March 3, 1863, which required the "Emporia branch," and to the act of July 1, 1864, which required a road from Emporia to Fort Riley, says:

> These *two pieces* of road, if ever they were built, would *necessarily* constitute one continuous road from Fort Riley down the Neosho valley to the point where the road should cross the line of the Leavenworth, Lawrence & Fort Gilson [now L., L. & G.] Railroad, and this is the road built by the M., K. & T. R. R. Co., under the act of 1866, *and* under *its contract* with the A., T. & S. F. R. R. Co. [the assignment of March 19, 1866, which gave no right under the act of 1866] and the grants of the state of Kansas.

That is, the road from Emporia to the L., L. & G. crossing, was made under the act of 1863; from the crossing south, it was made under the act of 1866; from Emporia north, it was made under the act of 1864. And the court say:

> The act of 1866 is, as we suppose, *supplementary* to the acts of 1863 and 1864."

Thus the act of 1863 was, as to this part of the road, *in full force.*

And the court say that Congress—

> Intended by the latter act [of 1866] to *ratify* and *make good* the right which the U. P. R. R. Co., Southern Branch [M., K. & T. Co.] *already had*

[under the act of 1863, by the assignment of March 19, 1866] to the *same lands* for the purpose of building that road."

The act of 1866 ratified the "assignment," for the purpose of giving land-grant rights under *the act of* 1863 for *this portion of the road*. The act of 1866 did *not* intend to give land grant rights for this portion of road, because, if so, its purpose to ratify the assignment as giving rights under the act of 1863, would have been unnecessary. It is absurd to suppose that Congress made a *duplicate grant* for the *same piece of road*. The *prior* grant would leave *nothing* for a second grant to operate on.

The act of 1866, if in force as to this part of road, would, on the theory of the court in the *Brewster case*, have *given the same* land granted and indemnity sections as the act of 1863. It is absurd to assume that when Congress had assented that the M., K. & T. Co. should hold under the act of 1863, the land grant rights of the Emporia branch "down the Neosho valley," it would *duplicate* the grant.

If the act of 1866 merely *ratified* the land rights of the M., K. & T. Co. under the act of 1863, it thereby secured *priority* as against settlers from March 3, 1863; whereas under the act of 1866, it would lose lands settled on between March 3, 1863, and July 26, 1866.

The act of 1866 only applied where it could give *odd* sections for indemnity as well as *even*. And as to *this part* of the road the M., K. & T. Co. took odd sections *only* under the act of 1863—not under the act of 1866.

THE CONCLUSION *is inevitable that the act of* 1866 *made no land grant for* THIS PORTION *of the road. It was only operative to make a land grant north of Emporia and south of the crossing of the M., K. & T. and L. L. & G., where the act of* 1866 *could have full effect.*

SECOND PROPOSITION.

THE PATENTS OF THE M., K. & T. CO. SHOULD BE CANCELLED, BECAUSE ITS ROAD DEFLECTS FROM THE LINE OF DEFINITE LOCATION.

In other words:

By the act of 1866 a grant of lands was made with indemnity rights on conditions and considerations; the road was to be constructed on the line of definite location in ten mile sections as a *condition precedent* to the right to lands; *conditions subsequent* were annexed to the grant, that the company should after such construction keep it in repair, carry Government war supplies free from cost, and mails at prices fixed by the Post-office department.

The company *failing to perform the conditions precedent*, never earned *any lands*, and by *failure to perform the conditions subsequent*, to *construct* and *maintain*, a road on the line of location, has forfeited its right to lands, and so its patents should be cancelled.

THE STATUTE REQUIRES A ROAD ON LINE OF DEFINITE LOCATION.

It shows that the *line of construction* must be on the *line of definite location.*

The act of 1866 makes a grant to aid the R. R. Co.:

> To construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State.

This prescribes the *general* route of the road, but the statute requires *more* than this. It requires an *exact location*. It fixes the precise *time* when the grant *in præsenti*, becomes operative to identify the granted lands, as it says:

> When the line of said road is *definitely located*. Sec. 1.

It requires the company to:

> File with the Secretary of the Interior maps of its line designating the route thereof. Sec. 4.

These provisions require a precise definite location. Then this act refers to the road as one to be *constructed* on this precise line.

The grant is of:

> Every alternate section of land, or *parts thereof*, designated by odd numbers, to the extent of five alternate sections per mile on each side of said road—

Meaning the constructed road on the definite line of location.

And the grant is to follow the *located* and *constructed* line so *exactly*, that it regards "*parts*" *of sections*, so that the *ten-mile limits* shall not depart from the located and constructed road to the extent of the width of the smallest legal subdivision of a section—the width of a forty-

acre tract. An isolated departure *less* than this, may possibly be regarded as within the maximum; *de minimis lex non curat.*

The statute says the indemnity lands are reserved:

> For the purpose of the construction and operation of *said railroad* as provided by this act. Sec. 1.

—that is, the road to be *constructed* on the line of definite location.

And again:

> That said lands hereby granted shall not be selected beyond twenty miles from *the line* of said road. Sec. 1.
>
> That sections and *parts of sections* of land, which, by the aforesaid grant, shall remain in the United States within ten miles on each side of said road, shall not be sold for less than double the minimum price. Sec. 2.
>
> That settlers * * shall be entitled within the said limits of ten miles to patents. Sec. 2.
>
> That the grant of lands hereby made is upon condition that said company, after the *construction of its road*, shall keep it in repairs. Sec. 3.
>
> When * * any *section of ten consecutive miles* of *said road* is *completed* * * the Secretary of the Interior shall issue to the said company patents for so many sections of the *land granted* within *the limit* above *named*, conterminous with said *completed sections* hereinbefore granted. Sec. 3.

Here patents are to be issued for sections of land "conterminous with said *completed* section" of road, but they are to be "of the land herein granted," and the *land herein granted is determined* by *the line* of *definite location.*

By section 4 of the act it is made the duty of the Secretary of the Interior to withdraw from market, &c., lands granted in place:

> As soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof.

This means the *exact* route thereof, because otherwise it would be impossible to specify the sections withdrawn. Whenever a map of a *proximate* or *probable* line of road has been authorized, it has been done in *express terms*, as in the Act of July 1, 1862, (12 Stat. 489),

The Supreme Court has said:

> The act which fixes the *time* of *definite location*, is the act of filing the map or plat of the line in the Office of the Commissioner of the General Land Office. * * Up to that time the right of the company to no definite section or part of section [of land granted in place] is fixed. * * The right of the company becomes by that act vested. * * It is an act to be done by the company. *Kansas Pacific R. R. Co.* v. *Dunmeyer*, 113 U. S. 634.

Patents are to be issued for granted lands. Granted lands are those within ten miles of definite location of road.

The lands to be patented must be "conterminous with said completed" road. *Ergo*, the *line* of *located* and *completed* road must be the same.

The word "conterminous," according to Webster, is of latin derivation "from *con* and *terminus*, border," and the definitons given are:

> Having the same bounds, or boundaries; bordering upon; contiguous.

Hence the statute is to be construed as reading:

> When any section of ten consecutive miles of said road is completed * * the Secretary of the Interior shall issue to the said company patents for so many sections of the land *herein granted* within the *limits above named* [being ten miles on each side of the line of definite location] conterminous with [bordering upon] said completed section, [line of road] herein before granted.

Finally, if there be any *doubt* as to the proper construction of the statute, it is to be resolved against the railroad claim.

> If there are doubts about * * the extent of the grant the government is to receive the benefit of them. *L. L. & G. R. R. Co* v. *U. S.*, 92 U. S. 746.

The conclusion is inevitable that where the constructed road deflects from the line of location, no indemnity lands can be selected conterminous therewith.

THE AUTHORITIES SUPPORT THIS VIEW.

The statute gives to the Company a *special limited power*, to locate its line of road. And this line so "definitely fixed" can not be subsequently changed, as it would be by constructing its road on a different line.

The power to fix location is *exhausted* when once exercised, and hence *cannot be changed* as it would be by by building a road on another line. Thus it has been said:

> I take it to be a sound principle, that when a special tribunal is created, with limited power and a particular jurisdiction, * * whenever the power given is once executed, the jurisdiction is exhausted,

> and at an end; that the person thus invested with power is, in the language of the law, *functus officio*. *Ex parte Randolph*, 2 Brock., 473; 10 Op. Att'y Gen'l 259; *Crepp* v. *Durden* 2 Cowper, 640; *Mills* v. *Collett*, 6 Bingham, 85; S. C. 19 Eng. Com. L. R., 11.

On May 10, 1869, Secretary Cox, of the Interior Department, upon application of the McGregor & Sioux City R. R. Co., for leave to file a new map of definite location said:

> After a road has been definitely located, the map thereof filed here and accepted, and the lands withdrawn, no specific authority is given whereby this department can accept another location, and in the absence of such authority I must decline to give my approval to the map now presented.

So it is said:

> The power of the [railroad] company to *determine its location* when *once exercised* is exhausted. This is in accordance with the ancient rule that "if a man once determines his election it shall be determined forever." Pierce on Railroads, 254, citing numerous cases. *Atkinson* v. *M. & C. R. R. Co.*, 15 Ohio St. Rep., 32.

It was held that a company whose charter authorized it to change the location of its track on account of "difficulties of construction," can not do so after its road has been constructed."

In *Morehead* v. *Little Miami R. R. Co.*, 17 Ohio Rep., 352, it appeared that the company, having constructed its road, claimed the right to *relocate* and reconstruct *between*

points named in its charter. At the suit of land owners, the Court *enjoined* the *change*, and said:

> The completion of this road *upon the route first located* exhausted all the power of the company. The force of the grant was then spent, and no matter how necessary the change of location may be at present, the company must seek authority to make that change in some *legislative enactment* aside from their act of incorporation.

A railroad company has no authority to exercise the power of eminent domain or condemn lands for a right of way *on any other route* than that of *its location*.

This *precise question* is decided in *Morehead* v. *Little Miami R. R.*, 17 Ohio 340. The company having constructed its road on one location, sought to exercise the right of eminent domain to condemn another location in *close proximity* to the *former* route. The court denied the existence of such power and enjoined the attempt to do so. The authorities show that the *line of definite* location is as *firmly fixed* by *filing a map* of location in the General Land Office, as by the *construction of a road*.

Yet if the Little Miami R. R. Co. could not lawfully condemn land for a new location, how can the M. K. & T. Co. obtain authority to change its location—for the construction of a road deflecting from location is a change of location.

If a railroad company attempts to construct its road deflecting from its line of location, it may not only be *enjoined* from so doing, but if it makes its road so deflecting it is liable in *damages* as a *trespasser*.

Little Miami R. R. Co. v. *Naylor*, 2 Ohio St. 235. The railroad company having constructed its road *along a*

street, changed the location and constructed a road *on the* [same] *street nearer to Naylor's house* than the original location. He sued to recover damages, and the court, in affirming the judgment in his favor, said:

> The location of a railroad through a settled country will always produce a great change in the use of the property along its track. Improvements are made in reference to the track *as located*. To change the track in many instances will produce as great damage to property as the making of a new road. * * * When it [the company] has made its selection [of a route] its rights over all the other territory ceases. * * * The act of the railroad company in changing their location being unlawful, the next question arises whether they are liable * * * for the damages, etc. (See *Newton* v. *A. B. R. R.*, 15 Gray, 27.)

This case shows that a railroad company cannot lawfully change a location even to *half the width of an ordinary street* in a city.

The well considered settled law of England is in accord with the principles stated.

Blakemore v. *Glamorganshire Canal N. Co.*, 2 Mylne & Keene, decided in 1832. By an act of Parliament the company was authorized to construct a canal between *specified points*. Blakemore filed a bill to enjoin the construction of the canal in a mode different from that prescribed by the act.

Lord Eldon said:

> When I look upon these acts of Parliament I regard them all *in the light of* CONTRACTS, made by the legislature on behalf of every person interested in anything to be done under them. * * Unless

that principle is applied in construing statutes of this description they become instruments of *greater oppression* than anything in the whole system of administration under our constitution. It may be of very little consequence to A. B. whether the canal is brought to his lands through the lands of C. D. or through those of E. F.; nevertheless *if the legislature has said the canal shall be brought* to the lands of A. B. from the lands of E. F., and not of C. D., *this Court* would never permit the parties to bring the canal to the lands of A. B. from the lands C. D.; the parties are obliged to *submit to the contract which the legislature has made for them.* I have therefore stated, and I have already more than once acted upon the doctrine, that *if a* DEVIATION FROM THE LINE MARKED OUT BY PARLIAMENT WERE ATTEMPTED, I would stop the further making of a canal which was in progress, and for this reason, that a man may have great objection to a canal being made in *one line* which he would not have to its being made in another, and particularly he might feel that objection in a case where parties, after *obtaining from the legislature leave to do one thing*, set about doing another. (See *Canal Co.* v. *Blakemore*, 1 Cl. & Fin. 262; *State* v. *Norwalk & D. T. Co.*, 10 Conn. 157; *Turnpike Co.* v. *Hosmer*, 12 Conn. 364; *Louisville & N. Turnpike Co.* v. *Nashville & K. T. Co.*, 2 Swan. (Tenn.) 282; *Williams* v. *H. & N. H. R. R.*, 13 Conn. 411.)

If a person once determines his election it shall be determined forever. (Comyn. Dig. title "Condition," Ch. 2; Co. Litt. 145; *Griffin* v. *House*, 18 Johnson R. 397.)

It can make no difference in the application of the *principle* of these cases, even if there had been a change of a road previously *constructed*. The authorities cited show that when a *location* is *once made*, it can not be changed—

in other words, the *location* just as completely imposes on a company a duty to *construct* its road on *the line of location*, as to *maintain* its construction on the line once *constructed*. What *reason* is there in saying a company can not change its line of location, but may construct its road *away* from such line? What is the utility of having a line of location, if a road may be constructed deflecting from it? It may be said it marks out and *fixes the limits of a land grant*—so it does. But the principle applies to *all locations of all roads*, non-land-grant roads, as well as land grant.

In *Grinnel* v. *Chicago, R. I. & P. R.*, 103 U. S., 739, it appeared that the act of May 15, 1856, made a land grant for a railroad, the line of location of which was duly filed. (11 Stat., 9.) The act of July 2, 1864, (13 Stat., 95), authorized a *change of location*. The Railroad Company accordingly—

> So changed the route as to place it at *some points* south of the fifteen-mile limit of the grant as ascertained by the first location.

Settlers on the lands claimed that the change of location changed the grant, and that they should hold the land within the limits of the first location for homesteads. The court said *they* could not avail themselves of the objection that the constructed road deflected from its line of location, but that the United States could.

Miller, J., said :

> Did their [R. R. Co.'s] construction of the road on the new line annul or defeat, *without further action* on the part of the United States, the title thus vested * * *

> If no law had been passed authorizing the change of route, it is possible the Government might have reclaimed [ALL] these lands as forfeited by reason of the change to which it had not consented. But Congress did consent to the change.

On February 2d, 1880, Mr. Attorney-General Devens, in an opinion addressed to the Hon. Secretary of the Interior, said:

> The law clearly contemplated that the road was to be constructed according to the line of definite location. For this purpose lands along it were withdrawn from the market and public information given by which parties purchasing property in the vicinity were to be governed. The lands in question were separated and set apart from the public domain, and the adjustment of the grant was to proceed *according to the line thus definitely located. Whatever adjustments, therefore, of the grants is made must be made according to the line of definite location.* To hold that the grant could be adjusted according to *a different and distinct line*, upon which a road, perhaps answering in general terms the description given in the granting act, might be constructed, would be to hold that there were actually two grants of land. It cannot be possible that the grantee, having made his grant definite and having had the land granted, separated from the public domain, can take it up and relocate it so as to appropriate other lands. The grant lost its character of a float by the definite location. It is, therefore, necessary in adjusting the grant, that it should be adjusted according to the line of definite location. (16 Op. 462).

In *Van Wycke* v. *Knevals* (106 U. S. 366), the Supreme Court said:

> The route must be considered as "definitely fixed" when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such route "as it may deem best after an examination of the ground has disclosed the feasibility and advantages of different lines." But when a route is adopted by the company, and a map designating it is filed with the Secretary of the Interior, and accepted by that officer, the route is established. It is, in the language of the act, "definitely fixed," and cannot be the subject of future change, so as to affect the grant, except upon the legislative consent. See *K. P. Co.* v. *Dunmeyer*, 113 U. S. 629.

THE CONCLUSION *is irresistible, that a line of definite location once filed with the Commissioner of the General Land Office can not be withdrawn or changed.*

The opinion of Attorney-General Devens of February 2, 1880, (16 Op. 462), was given in answer to two inquiries, one, whether a land grant was to be adjusted according to the line of definite location or the line of construction.

As to this he said:

> To hold that the grant could be adjusted according to a different and distinct line, [from that of definite location] upon which a road perhaps answering *in general terms* the description given in the granting act might be constructed, would be to hold that there were actually two grants of land. It can not be

> possible that the grantee, having made his grant definite and having had the lands granted separated from the public domain, can take it up, and relocate it, so as to appropriate other lands.

It may be here remarked that it will "appropriate other lands" if the constructed road deflects to the extent of the smallest legal subdivision of land—40 acres.

He then proceeds to show that if a railroad company makes a line of road "answering *in general terms* the description given in the granting act," but "upon a different line from that of definite location," the company will *lose its entire grant*. He says:

> The * * inquiry is, whether, if the road be built upon a line different from that of definite location, the lands ascertained by the definite location, can now be patented to the State [for the R. R. Co.]?
>
> If this could be done, its effect would be sufficiently obvious. A tract of country not receiving the benefit of the road would be charged with the burden of having its lands granted to the railroad company, whose roads did not accommodate it. Persons owning property in farms or villages, who had purchased with the belief that the road was to be constructed according to the line of definite location, would find that they were in some instances many miles distant from the road, the benefits of which they had expected to receive.
>
> In order to entitle the State [for the railroad company] to the benefit of the lands granted, it is necessary that the road should be constructed according to the line of definite location.

In *Kansas Pacific Railway Company* v. *Dunmeyer*, 113 U. S. 634, Justice Miller, in discussing the effect of a similar statute, emphatically says:

> The company makes its own preliminary and *final surveys* by its own officers. It selects for itself the *precise line on which the road is to be built*, and it is by law bound to report its action by filing its map with the Commissioner, or rather in his office. The line is then fixed. The company *cannot alter it*, so as to affect the rights of any other party. (p. 634.) * * The company *had no absolute right until the road was built* [on the line of definite location] or that part of it which came through the land in question. (p. 641.)

And it is to be specially borne in mind that the *line of location*, and not the *line of construction*, fixes the granted and indemnity *limits*—the ten and twenty mile limits of railroad grants.

If a homestead entry is made immediately on the line of definite location at a point where a depot must inevitably be built, or a village spring up, a departure of a mile in construction may defeat the whole purpose of the homestead entry. It is quite as important to protect the *rights* and *interests* of settlers and the observance of *good faith* to them, as it is to give to railroad companies the *same benefit* from violation of law, duty and good faith as to the observance of all these.

If this be not so, then a R. R. Company may make such location as to secure valuable lands, and then construct on a departure therefrom, because less expensive, and thus profit by its failure to file a true line of location. It may

make a circuitous location through unappropriated lands to secure them, and then construct a straight road through reserved lands. This would enable it to profit by a disregard of the statute. The line of this road was located over 2½ miles west of Humboldt, thereby extending its grant westward, so as to *avoid in part* an overlap in its grant with that of the L., L. & G. Road, thereby securing more land, but its road is made on a line touching Humboldt. The principle of law applies here that,

> Statutes are not to be *evaded*, any more than they are to be disobeyed. Sedgwick Stat. (2d ed.) 74; *Hannay* v. *Eve*, 3 Cranch, 242; *Humphrey* v. *Chamberlain*, 1 Kernan, 274. That which could not be done directly, * * * cannot be done indirectly. 4 Coke, 24 *b.*; *Caldwell* v. *Mayor, etc.*, 9 Paige Ch. 575; Broome's Legal Max. 832; Hardcastle Stat. Law, 24.

If a railroad company may file a circuitous line of definite location through fertile and valuable lands, and thereby secure them, and the large profits accruing therefrom, and then by a departure in construction shorten the line and save expense, the result is a practical fraud,—a fraud in the contrivance for procuring valuable lands, a fraud on settlers who find no road where one was promised, a fraud on the government and on settlers by taking valuable lands where a location on the line of construction would have given inferior lands to the railroad company, and left the valuable tracts for homestead entries.

There is no authority for saying that a right to lands in place, or indemnity lands, can attach along a portion of road which deflects from the line of location.

Attorney-General Devens, as already shown, said:

> In order to entitle the state to the benefit of the lands granted, it is necessary that the road should be constructed according to the line of definite location.

He then proceeds to say:

> Some deflections must, in many cases, be expected from the line of road as definitely located; but it is for the department to determine whether or not these make of it a different road, or whether there is substantial compliance with the line of definite location.

The only effect of this, *if it be sound*, is that "deflections in their character immaterial" do not defeat the entire grant. 2 Copp's Public Land Laws, 793. But if, as in this case, there be a deflection which is *locally material*, covering probably whole sections of road, certainly no grant or right to indemnity can attach as to *that portion*.

Grants are made and indemnity provided as compensation for each section of road, made on line of definite location. Where there is no such road, no land is earned. The completion of such road is a condition precedent (*Farnsworth* v. *M. & P. R. R. Co.*, 92 U. S. 65.) to the right to lands; if this fails, the right does not exist.

By section 3 of the act of 1866, the right to lands in place is earned in sections of ten miles.

> And the lands hereby granted shall inure to the benefit of said company as follows: when the Governor of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial and workman-like manner, as a first-class

> railroad, *then* the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted ["five alternate sections per mile on each side of said road." Sec. 1] within the limits above named [of ten miles from the line of definite location], conterminous with completed section hereinbefore granted, and when certificates of the governor aforesaid shall be presented to said secretary of the completion as aforesaid, of each succeeding section of ten consecutive miles of said road, the said secretary shall, in like manner, issue to said company patents for the land for each of said sections of road as in the first instance, until said road shall be completed.

Now if a whole section, or part of a section, is *not* completed on the line of definite location, *no lands can* "inure to the benefit said company." The granted lands are "within ten miles on each side of said road" (Sec. 2); that is, a road "*constructed according to the line of definite location.*" (16 Op. 463.)

When there is *no such road*, there can be no ten mile limit and no grant.

Where there is no grant in place, there can be no indemnity.

Where there is no ten mile limit, there can be no twenty mile indemnity limit.

This principle is recognized in *Winona & St. P. R. R. Co.* v. *Barney*, 113 U. S. 628, where the court, referring to selections of lands under the act of March 3, 1865, (13 Stat. 326), says:

> The *coterminous* principal applies to them, and they are to be selected along and *opposite* the *completed road*.

That is, the road completed as the law requires on line of definite location.

OFFICERS OF THE U. S. CAN NOT AUTHORIZE A DEFLECTION, OR WAIVE A RIGHT OF FORFEITURE RESULTING THEREFROM.

The Secretary of the Interior has no *discretion* to permit a road to be constructed deflecting from the line of location.

In the *Brewster Case*, 118 U. S. 682, the court said:

> While we are not disposed to hold the action of the officers of the Land Department of the Government as absolutely conclusive upon such a subject as this, we see no reason why their deliberate action with careful attention and all the means of ascertaining what was right should be set aside in this case.

This was not said as to the effect of a deflection, for the court held there was none. But the court said enough to show that public officers can not conclude the United States by accepting a road not made as required by law.

Clearly, if he can not permit a *change of location*, he can not *permit a construction* on a line *different* from that of *location*.

To do so would be to hold that the location is *without effect*, and may be repudiated and departed from at pleasure.

On February 16, 1857, Attorney-General Cushing said on this subject:

> That the state may lose this inchoate title [acquired under a land-grant act] by change of location. (8 Op. 390.)

The Supreme Court has determined that the acceptance by a railroad company of a land-grant constitutes a *contract* between it and the United States, by which the company *agrees to construct* a road *as required by the granting act*. (*U. S.* v. *Central Pacific R. R.* 118 U. S. 238.)

Now, if the *law requires a road to be constructed on its line of* definite location, then an officer who assumes a power to authorize it to be constructed elsewhere assumes a power to *set aside solemn contracts* with the government, and to nullify the law.

No officer can waive such location as the law requires. *Andrae* v. *Redfield*, 12 Blatchford 407. Andrae had a claim to be repaid excess of duties paid under protest to the Collector of Customs. The statute of limitations had nearly run in favor of the Collector when the Auditor of the Custom House agreed that the statute of limitations should not be pleaded. Subsequently Andrae brought suit against the Collector, who pleaded the statute. Andrae filed a bill in equity to enjoin the defendants from pleading the limitation. The court said:

> Neither the Government officers, nor any authority of the Government, can create a liability, either at law or in equity, which he [the defendant] did not incur, and we deny that either a subordinate in the New York Custom House, or even the Secretary of the Treasury himself, could deprive the defendant of his right to defend by any defense valid and legal for his protection.

It was suggested that the action was "practically against the Government." To this the Court said:

> The Auditor of the New York Custom House had no authority whatever to bind the Government.

The Supreme Court, on appeal, affirmed a decree dismissing the bill. (98 U. S. 225).

So in *Whiteside* v. *U. S.*, 93 U. S. 256, it is said:

> Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals in the latter category are in many cases bound by the acts and declarations of their agents, even where the act or declaration was made without any authority, if it appears that the act was done or the declaration made by the agent in the course of his regular employment. But the Government or public authority is not bound in such a case unless it manifestly appears that the agent was acting within the scope of his authority, or that he has been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the Government. (Story Agency, 6 ed. 307). *Lee* v. *Monroe*, 7 Cranch, 366. * * * * Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act. (*State* v. *Hayes*, 52 Mo., 578; *Delafield* v. *State*, 26 Wend., 238; *People* v. *Bank*, 24 Wend., 431; *Mayor* v. *Reynolds*, 20 Md., 10).

Nor can it be said the action of the Secretary of the Interior in certifying indemnity land selections along a deflected portion of road gives any right to such lands. Any such claim is completely denied by a principle laid down in *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 733:

> It is no answer to this, to say, that the Secretary of the Interior, certified these lands to the State for

> the use of the appellant. It is manifest that he did so under a mistake of law * * * This erroneous decision of his can not deprive the Winona Company of rights. * * [*Johnson* v. *Towsley*, 13 Wall., 72, 80; *Gibson* v. *Chouteau*, 13 Wall., 92, 102; *Shepley* v. *Cowen*, 91 U. S. 330, 340; *Moore* v. *Robbins*, 96 U. S., 530, 536.]

No error of any officer, either of fact or of law, can give to an officer power to do what the statute *does not authorize*, or make valid a patent unlawfully issued, when its validity is *directly* attacked in a suit by the United States. This is shown by the authorities just cited.

When Attorney-General Devens was considering the subject-matter of his opinion above-mentioned, it was:

> Suggested that the Governor having made his certificate under the fourth section of the granting act [corresponding with Sec. 3, above quoted of the act of 1866], the Secretary of the Interior cannot inquire whether the road is or is not constructed according to the line of definite location; that the Governor is the sole judge of the compliance of the company.

If this were so for purposes of executive action, it is not so when a judicial inquiry as to the validity of the patent is made.

But the Attorney-General denied the conclusiveness of the certificate for executive action.

He said:

> But the Secretary [of the Interior] must determine that the road has been constructed. The responsibility of issuing patents clearly imposes on him that duty, and as a necessary incident, the duty of determining that the road has been constructed as located.

A railroad company can not "take advantage of its own wrong" in constructing a road deflecting from the line of location, by pleading that some officer of the Government concurred in the wrong.

The act of 1866 does *not* devolve on the Governor any duty of certifying that a road is made on the line of definite location, but only authorizes him to certify as to the kind of road made.

To say that the Secretary of the Interior can permit a company to disregard and depart from *points fixed in an act of Congress*, is to say that he may in part *repeal an act of Congress*. It has already been shown in numerous acts of Congress that there is no power to *change* either the *beginning* or terminal point of a road, or a branch, except by authority of Congress. See act April 19, 1871, 17 Stat. 5; act July 1, 1864, 13 Stat. 339. The power to fix the points of a road in a land-grant act is LEGISLATIVE. The power to change them is legislative.

An attempt to do either by executive authority would be to invade the independent power of Congress.

The Secretary of the Interior is not charged with any duty in fixing the definite location of a road.

Thus the Supreme Court has said that—

> The act which fixes the line of *definite location* is the act of *filing the map or plat of the line in the office of the* Commissioner of the General Land Office. * * * Up to that time the right of the company to no definite section or part of section [of land granted in place] is fixed. * * * The right of the company becomes by that act vested. * * * IT IS AN ACT TO BE DONE BY THE COMPANY.
>
> * * * * * * *

> The company makes it own preliminary and *final surveys* by its own officers. It selects for itself the *precise line on which the road is to be built*, and it is by law bound to report its action by filing its map with the Commissioner, or rather in his office. The line is thus fixed. (*Kansas Pacific R. R. Co.* v. *Dunmeyer*, 113 U. S. 634).

Certainly, if the company would file a map of definite location, which did not pass through *points* required by Congress, it would be the duty of the Secretary to refuse all land-grant aid. (16 Opinions, Attys. Genl., 462). He would, in fact, in such cases, be without power to give such aid.

But he has no power to compel a company to locate its road even through the points fixed by Congress. His illegal selection of indemnity lands therefore settles nothing as to any *proper point* through which a road should run.

When a power is given to be exercised only *on the performance of expressly required conditions*, its exercise without such performance is in *excess* of authority, and is void.

The United States is not *estopped* from controverting the legality of the action of the Secretary of the Interior in selecting indemnity lands. Any such claim is completely denied by a principle laid down in *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 733, already cited.

Congress had a right to *fix points*, TO, and THROUGH which the M., K. & T. road should run. The *law* fixed the *line of construction* as firmly on the *line of location* as if incorporated in an act of Congress.

The *power* of the company was thus *fixed* and *limited* by law.

And Kent, in discussing the *execution of powers*, says:

> It is the plain and settled rule that the conditions annexed to the exercise of the power *must be strictly complied with*, however *unessential* they might have been if no such precise directions had been given. They *are incapable of admitting* any *equivalent* or *substitution*, for the person who creates the power has the undoubted right to create what checks he pleases to impose, to guard against a tendency to abuse. (4 Kent, 330.)

The Secretary of the Interior and other *general* officers have *general powers*, conferred by the general statutes. Even under *such* statutes the powers of public officers *must be strictly pursued*, and in the absence of specific statutory authority the act of such officer *does not bind the Government*.

Parsel v. *Barnes & Bro.*, 25 Ark. 261, 272; *Green, &c.*, v. *Beeson*, 31 Ind. 7; *State* v. *Bank of State*, 45 Mo. 528; *Andrae* v. *Redfield*, 12 Blatch. C. C. 407; s. c., 98 U. S. 225.

But the power given by the land grant acts to the Secretary of the Interior and other officers, is a *special statutory power*, to be *strictly construed* and "must be *pursued* in *strict compliance* with the [express] terms of the statute." Bishop, Written Laws, 119, and cases cited; Sedgwick on Statutes, 2d ed., 76.

The Consequences of Deflection.

The construction of the road on the line of location is by the very terms of the statute, a "*condition precedent*"

to the *right to any lands*. Thus in *Farnsworth* v. *M. & P. R. R. Co.* the court say, "the act made the construction of portions a *condition* precedent to a conveyance."

The company *never earned* and was *never entitled to any lands*.

The acceptance by a railroad company of a land grant constitutes a *contract* by it with the United States to construct a road as *required by the granting act*. (*U. S.* v. *Central Pacific R. R.*, 118 U. S. 238).

The authorities show that where the law requires a railroad company to construct a road *to, through or between specified points*, as a condition precedent to the payment of subscriptions, or to a grant of lands, no right to collect subscriptions, or receive lands exists unless such condition *is strictly complied with*.

Thus it is said:

> Precedent conditions must be *literally performed*, and even a court of chancery will never vest an estate when by reason of a condition precedent it will not vest in law. It cannot be relieved from the consequences of a condition precedent unperformed. (4 Kent Com. 125).

So it has been said of railroad subscriptions dependent on conditions:

> The Railroad [Company] which seeks the benefit of such aid is required to comply *strictly* with the terms AS TO LOCATION or completion of its road. A statute of Nevada provided that when a railroad built a first-class road from Virginia City to Carson City, running within *twelve hundred feet* west of French's mills, the county of Lyons should issue its bonds in aid of the railroad. The road

was built, but it ran within *twenty-four hundred feet* of the point designated instead of twelve hundred feet. A *mandamus* to compel the issue of the bonds was refused, the court considering the contract a *legislative contract* with a *condition precedent*, which *must be strictly complied with* to entitle the railroad to claim the benefits conferred by it. (*Virginia & Truckee R. R. Co.* v. *Lyons County*, 6 Nev. 68, 71; S. P., *City of Aurora* v. *West*, 22 Ind. 89.

And in a similar case, where the conditions to build within *one mile* of a town was not complied with, the court refused to issue process to compel the issue, although the inhabitants of the town had consented to the change, the consent being given after the vote had been taken on a proposition in which the location was fixed at ONE MILE of the town. (*State* v. *County of Davies*, 64 Mo. 30). Where LOCATION of the road was one of the conditions of issue, and the bonds were placed in the hands of a depositary, to be delivered when the conditions were complied with, the route was located as provided in the statute, and upon a certificate of the proper officials as to such location, one-tenth of the bonds were delivered. Subsequently the route was RELOCATED; the issue of the remaining nine-tenths of the bonds was restrained; the officers were held to be estopped by the first location, which was a *condition* of issue of the bonds in the hands of the depositary. (*Ally* v. *Adams Co.*, 76 Ill. 101; Burroughs on Public Securities, 267).

Where a railroad proposition for aid upon specified terms for a ROUTE *indicated in the submission* was accepted by a vote of the people of a town, MODIFICATIONS of the submission by the representatives of the town are *not valid*, and the issue of bonds upon the terms of the modified submission will be

restrained. (*Town of Platteville* v. *Galena*, 43 Wis. 492; Burroughs on Public Securities, 258; see State and County Court, 64 Mo. 30.)

Where one fails to perform his part of the contract, or disables himself from performing it, the other party may treat the contract as rescinded. 1 Parsons Cont. 19; Bishop Cont. 677; *Bloomer* v. *Bernstein*, Law Rep. 9, C. P. 588; *Chamber of Commerce* v. *Sallitt*, 43 Ill. 519; *Morgan* v. *Bain*, Law Rep. 10 C. P. 15; *Suber* v. *Pullen*, 1 S. C. 273.

See *Knevals* v. *Hyde*, 5 Dillon, C. C. 468.

And finally on this point the able Commissioner of the General Land Office, after a careful review of the authorities, in an opinion of September 12, 1887, said:

> In my opinion, the [C., St. P., M. & O. R. R.] Company, by its failure to construct its road upon the line of definite location, abandoned its grant to the extent of the deflections. Vol. 1, Rep. Sec'y Interior, 1887, p. 378.

Thus far the *failure to comply* with *conditions precedent* has been considered.

CONDITIONS SUBSEQUENT.—THE RAILWAY COMPANY, BY ACCEPTING THE ACT OF 1866, UNDERTOOK THE PERFORMANCE OF "CONDITIONS SUBSEQUENT," THE FAILURE TO PERFORM WHICH FORFEITS THE RIGHTS TO INDEMNITY LANDS. The obligation to construct the road according to agreement, on the line of definite location, was a "condition subsequent."

Thus the act of 1866 provides:

> Sec. 3. That the grant of lands hereby made is upon *the condition* that said company, *after* the *con-*

> *struction* of the road, *shall keep it in repair and use*, and *shall at all times transport troops*, munitions of war, supplies and public stores upon the road for the government of the United States free from all cost or charge therefor.
>
> Sec. 5. That the United States mail shall be transported on said road * * at such price as Congress may by law provide.

Here are *conditions subsequent:*

1. To construct the road on the line of definite location.

2. To *maintain* and *keep it* in repair on said line.

3. To carry war supplies and mails on "said road."

The authorities show that *for a breach of any one of these conditions*, the United States may reclaim the lands patented to the company.

1. As to the *failure to construct:*

The acceptance of a grant by a company constitutes a "contract" by it with the United States to *construct* and to *maintain* an entire line of land grant road. (*U. S.* v. *Central Pacific Co.*, 118 U. S. 238).

If a railroad company fails to complete its entire line of road under land grant acts, the failure is a breach of a *condition subsequent*, for which the United States may have a judicial forfeiture.

Thus in *Northern Pacific R. R.* v. *Majors*, 5 Montana, 111, S. C. 14 Am. & Eng. R. R. Cases, 487, a part of the syllabus as found *in the Vol. of R. R. Cases*, is thus:

> An act of Congress granting lands in aid of a railroad company contained a clause 'that there be and hereby is granted' to the company twenty alternate odd sections of land per mile on each side of

such route as the company might adopt, and * * * that as each twenty-five miles of road should be completed the lands should be conveyed by patent to the company, and not before.

1. *Held:* That immediately upon the location of the road, before its construction, or the issuing of a patent for the lands, the title had vested in the company as of the date of the original act, and that ejectment might be maintained on such title.

2. The character of the title was that *of a grant upon condition subsequent, liable to be divested by a breach of such condition.*

3. Such breach could only be taken advantage of by the United States.

A foot note to the case cites *Iowa* v. *Kirkwood*, 14 Iowa, 162; *Neer* v. *Williams*, 27 Kansas, 1; S. C. 10 Am. & Eng. R. R. Cases, 561; *Peck* v. *Rusk*, 10 Am. & Eng. R. R. Cases, 642; *St. Louis R. R.* v. *McGee*, 75 Mo. 522; S. C. 10 Am. & Eng. R. R. Cases, 649; *Swan* v. *Lindsey*, 70 Ala. 507.

In *Railroad Land Co.* v. *Courtwright*, 21 Wall. 316, it is said of a similar statute:—

> The * * conditions as to the completion of the road imposed by the state are *conditions subsequent* and not conditions precedent.

The conclusion is inevitable that the railroad company has forfeited its claim to indemnity, because of its failure to *construct* a *line of road* as required by its contract.

2. The condition subsequent to "*maintain*" the road *on the line of location.*

The authorities show that these are not *mere covenants*, but *conditions subsequent*. *U. S.* v. *Central Pacific R. R.*,

118 U. S. 238; *Railroad Co.* v. *Courtwright*, 21 Wall. 316; 2 Parsons' Cont. 527; *Boone* v. *Eyre*, 1 H. Bl. 273 *n*; *Finley* v. *King*, 3 Peters, 374; *Davis* v. *Gray*, 16 Wallace, 203; *Hale* v. *Finch*, 104 U. S. 261; *Cowell* v. *Springs Co.*, 100 U. S. 55; *Close* v. *Burlington R. R.*, 64 Iowa, 149; S. C. 17 Am. & Eng. R. R. Cases, 35; *Blanchard* v. *Railroad Co.* 31 Mich. 43; 4 Kent, 122; Wright on Tenures, 196; Butler's, note, 84, Co. Litt. lib. 3.

The breach of the conditions subsequent has been shown.

> To build or *construct* a railroad is *one* thing; to *maintain* the structure after it is erected or built, is *another*. The word maintenance has reference to the powers to be exercised *after* the completion. This is the natural force of the expression. *Moorhead* v. *Little Miami R. R.*, 17 Ohio, 353.

All the granting acts expressly impose the *condition to maintain* the road—"said railroads shall be and *remain* public highways," etc.

The conclusions are inevitable, that:

1. The R. R. Co., by failure to construct its road on the line of location, failed to earn any lands; and,

2. That its failure to construct and to maintain a road on such line are breaches of conditions subsequent which forfeit all its land grant rights.

The *right* of the United States to require a *judicial forfeiture* for such a breach, is supported by the authorities.

C., C. C. & I. Ry. Co. v. *Coburn*, 91 Ind. 557; s. c., 17 Am. and Eng. R. R. Cases, 37. In February, 1849, Coburn, "in consideration of the advantages which will

result to the public," and to him from the construction of the railroad, granted to it the right-of-way through a tract of land. It was a part of the arrangement that the railway company should "*maintain*" a depot near this land. The company constructed the road and the depot, but subsequently *failed* to *maintain* the depot. Coburn filed a bill to have the grant declared forfeited, and it was so decreed.

The Court said:

> In the *Indianapolis, etc., Ry. Co.* v. *Hood*, 66 Ind. 580, it was held that where real estate is conveyed to a railroad company for and in consideration of the permanent location and construction of the depot of its railroad thereon, and such depot is constructed thereon, but is subsequently removed and located upon other land, the *removal constitutes a breach of a* CONDITION SUBSEQUENT, although the word 'condition' be not used in the deed. The court cited *Cross* v. *Carson*, 8 Blackf. 138 (44 Am. Dec. 742); *Leach* v. *Leach*, 4 Ind. 628; s. c., 10 Ind. 271; *Scott* v. *Stipe*, 12 Ind. 74; *Clark* v. *Halton*, 57 Ind. 564; see, also, *Rawson* v. *Inhabitants*, 7 Allen, 125; *Homer* v. *Chicago, etc., Ry. Co.*, 38 Wis. 165; *Hunt* v. *Beeson*, 18 Ind. 380; *Lindsey* v. *Lindsey*, 45 Ind. 562. In determining the question whether the estate granted is one upon *condition subsequent*, the court will seek to enforce the intention of the parties, to be gathered from the instrument, and the existing facts. 4 Kent. 132; 2 Pars. Cont. 499; Chitty Cont. 74; *Horner* v. *Chicago Ry.*, 38 Wis. 174. Decree accordingly.

In a note to 17 Am. & Eng. R. R. Cases, 44, numerous cases are cited. (See *Parmelee* v. *Oswego R. R.*, 6 N. Y. 74; 7 Barb. 599; *Underhill* v. *Saratoga R. R.*, 20 Barb.

455; *Jackson* v. *Florence*, 16 Johns. 47; *Palmer* v. *Plank Road Co.*, 11 N. Y. 389; *Blanchard* v. *Railroad Co.*, 31 Mich. 43.)

CONSTRUCTIVE FRAUD.

The *deflection* of the road from the line of location is a *constructive fraud* on the United States, and on settlers, which justifies a denial of the right to idemnity lands.

Ex dolo malo actio non oritur.

> A deceitful promise not meant to be performed * * is deemed a fraud. Bishop Cont. 222; *Miller* v. *Howell*, 1 Scam. 499; *Dowd* v. *Tucker*, 41 Conn. 197; *Kinard* v. *Heirs*, 3 Rich. Eq. 423; *Richardson* v. *Adams*, 10 Yerger, 273; *Farrar* v. *Bridges*, 3 Humph. 566.

And it is well settled in such case that the court will rescind the contract, and restore the property procured by fraud, even without requiring the Government to restore or make compensation for any benefits it has received, though in this case the Government has nothing to restore. (Bishop on Cont. 212.)

Thus in *Martin* v. *Martin*, 35 Alb. 560, it held that:

> It is not necessary to the maintenance of a bill in equity for the rescission of a contract on the ground of fraud, that the party complaining should have first restored or offered to restore what he received under the contract. *Garner* v. *Leverett*, 32 Alab. 410; *Bailey* v. *Jordan*, *Id.* 50; *Abbott* v. *Allen*, 2 Johns. ch. 519; *Parham* v. *Randolph*, 4 How. (Miss.) 435; *Edward* v. *McLeary*, Cooper Ch. Cas. 308; 2 Swanst. 302.

> Courts of equity will generally set aside and cancel and direct to be delivered up agreements and other instruments, however solemn in their form or operations, where they are voidable and not merely void, under the following circumstances:
>
> *First*, where there is actual fraud in the party defendant in which the party plaintiff has not participated;
>
> *Secondly*, where there is a constructive fraud against *public policy*, and the party plaintiff has not participated therein. 2 Story Eq. 695.

It is enough for this case to claim only a constructive fraud. Adams in his Equity, in discussing rescission and cancellation of contracts for fraud, says:

> The jurisdiction will be exercised against any one who has *abetted* or *profited* by the fraud, and after any length of time. p. 176.

THE CONCLUSION *is inevitable that the United States has a right to demand a restoration of the indemnity lands.*

REPLY TO THE ARGUMENT FOR DEFENDANTS ON THIS SUBJECT

The opinion of the learned Judge in the Circuit Court, gives some "general considerations" on this subject and then says:

> These general considerations are also an excuse for not entering upon a more careful and elaborate discussion of the various questions presented by counsel

For reasons already stated it was not necessary to fully consider them

The bill alleges the deflection of the constructed road from the line of location, of an average distance of two miles and at Humboldt of over two and a half miles; that the "location was fraudulently made by said company on a line to secure more and better lands than it could secure if the line of location had been on the line as constructed" and that the patents for land were issued to the company "by reason of the false and fraudulent representation of said company that it had constructed its road as required by law"—that is on the line of locations.

The argument in the Circuit Court seeks to avoid the effect of these averments on several grounds, some of which will be noticed:

I. The argument says:

> This claim seeks to avoid the entire grant, because of a matter purely technical, which is not shown to have injured any one.

A sufficient *reply* to this is, that the bill does show that the Company by its fraudulent location, and representations obtained "more and better lands" than it would have otherwise secured. This injures the United States. Any averment of fraud really is not necessary. The Company was bound by its *contract*, and as a *condition* of the land grant to make its road on the line of location.

II. The second point made in argument is "that the United States at this *late day*, after so many complicated and extensive interests and relations, have adjusted themselves *upon the supposition* that the grant was valid will not be permitted to reclaim these lands on *such* a ground"

This presents two points (1) *stale claim*, and (2) *innocent purchasers*.

REPLY.

1. As to *stale claim*. The patents were issued in 1875, 1876, 1877 and the original bill in *this case* was filed Febry. 19, 1886.

The claim made by the United States would not be stale in the hands of a private citizen.

The statute of limitations for manifest reasons does not run against the United States.

Laches can not be imputed to the Government—a doctrine founded "upon a *great public policy*." *U. S.* v. *S. C. C. & T. Co.*, 5 McCrary C. C. 572. The United States in asserting its rights is not barred by *laches* of its officers and agents. *Hart* v. *U. S.*, 95 U. S. 316; *Gaussen* v. *U. S.*, 97 U. S. 584.

2. *As to the claim of innocent purchaser.*

The REPLY to this is:

There can be no innocent purchaser.

Purchasers are chargeable with notice of the facts shown by the laws and records, on which the patents were issued—The records in the General Land office show the line of location and the deflection of the road therefrom.

The bill in this case (printed record p 9) avers that the lands or many of them, have always been in the possession of settlers claiming them, and that "the defendants and those under whom they claim title always well knew all the matters aforesaid."

FOURTH PROPOSITION.

THE LANDS IN CONTROVERSY WERE NOT SUBJECT TO GRANT OR INDEMNITY SELECTION BECAUSE OF THE NEW YORK INDIAN RESERVATION CREATED BY THE TREATY OF 1838. 7 STAT. 550.

If these lands were in 1863 and 1866 an Indian Reservation, they were not subject to the granting acts. *L., L. & G. Co.* v. *U. S.*, 92 U. S. 746.

That the treaty made an absolute grant in fee of the Indians is so clear from its terms as to admit of no doubt. The only question is, was the reservation made by the Treaty of 1838, subsisting in 1863 and 1866?

Upon that question I submit a copy of the letter of the Commissioner of the General Land Office to the Secretary of the Interior, October 31, 1887. Rep. Sec'y Interior, 1887, vol. 1, page 384.

This Treaty has never been cancelled by Treaty, nor by any act of Congress.

The Indian rights have not been forfeited. By the Treaty the Indians were to remove to the lands within five years, or such other time as the President might from time to time appoint. The Commissioner of Indian Affairs has well said, "the phrase 'or such other time' would seem to mean an *extension of time* rather than a limitation." Senate Miscel. Doc. No. 38, 2d Session 47th Congress, January 27, 1883. And besides, their removal was not a condition of title, or if so, it was a condition *subsequent*, which would require a judicial forfeiture, or an express act of Congress. *Schulenberg* v. *Harriman*, 21 Wallace, 63.

And Congress has repeatedly recognized the Indian rights. Act Feb'y 19, 1873, 17 Stat. 466; Act April 17, 1878, Stat. p. 36.

The history of this reservation is given somewhat fully in the Senate Document to which reference has been made. The conclusion is inevitable that the reservation was subsisting in 1863 and 1866.

REPLY TO THE ARGUMENT FOR DEFENDANTS ON THIS SUBJECT.

III. In the Circuit Court the argument for the defendants assumed that the Indians had "abandoned" these New York Indian lands and "such abandonment would leave the land subject to the operation of the grant" of the act of July 26, 1866. *Butts* v. *N. P. R. R.*, 119 U. S., 71: 21 Wall., 309:

To this it is sufficient to reply:

1—The Government as already shown has recognized the Treaty as in force, and in 1868—even after the act of July 26, 1866—the President and the Indians made a treaty for the surrender of the Indian title, but the Senate refused to ratify it, as we may reasonably suppose for the purpose of continuing the reservation for the Indians.

2. As these lands were *reserved* from the grant made by the act of March 3, 1863, because they were an Indian reservation (92 U. S., 746), a subsequent *abandonment* would not subject the land to the grant, but it would revert to the *United States*, relieved of any claim by the railroad company: Southern Pacific R. R. case 6 Int. Dept. Land Decisions, 349; Newhall *v.* Sawyer, 92 U. S. R. 761; M. K. & T. R. R. Co. *v.* Noyes, 25 Kas. 340; Ryan *v.* Central Pacific R. R. Co., 99 U. S. 386; St. Paul R. R.

Co. *v.* Winona R. R. Co., 112 U. S. 730; Copp's Land Owner, vol. 11, pp. 219, 314; Emerson *v.* Central Pacific R. R. Co, vol. 3, Land Decisions Sec. Interior, 117, 166, 227, 490, 305; K. P. R. R. Co. *v.* Dunmeyer, 113 U. S. 629. See Act Congress April 21, 1876, 18 Stat. 35, and Act June 15, 1880, 21 Stat. 236; L. L. & G. R. R. Co. *v.* U. S., 92 U. S. 741; A. T. & S. F. R. R. *v.* Rockwood, 25 Kas. 292.

II. The argument for defendants assumed that the President's proclamation of August 21, 1860, for the sale of the lands covered by the Treaty was a sufficient declaration of forfeiture of the rights of the Indians.

To this it is sufficient to reply:

1. The President had no authority to declare a forfeiture as against the Indians. Fort Boisé Hay Reservation case, 6 Int. Dept. Land Decisions 16.

If this could be done at all it would require an act of Congress or a judicial decree. Schulenberg *v.* Harriman, 21 Wall. 62.

2. The Proclamation was never carried into effect. The lands were not sold

FIFTH PROPOSITION.

THE M., K. & T. RY. CO. HAS RECEIVED MORE LANDS THAN IT IS LAWFULLY ENTITLED TO, EXCLUSIVE OF THE LANDS NOW IN CONTROVERSY.

This question was not decided in the recent *Brewster case*. 118 U. S. 682. On the contrary, the Court said of this question:

> The issue is not fairly in the bill, and certainly no particular certificate, nor any particular patent from

> the state of Kansas is pointed out, as being *the* one which contains the excess over the grant, and it is not possible for the Court, under any evidence or any pleading, to ascertain which of the certificates and of these patents, or what particular portions of them, should be void and what valid. *U. S.* v. *B. & M. R. R. Co.*, 98 U. S. 334.

The bill in *this* case now before the Court makes *direct averments*, to raise this question.

It avers (printed record 13) that the M. K. & T. Ry. Co. only constructed a road from Fort Riley to Parsons, 157 miles; that of this distance the road runs 40 *miles*, through land grants for the Kansas Pacific R. R. Co., and the A. T. & S. F. R. R. Co.; that it is entitled to no *grant* or *indemnity* through these two grants, thus leaving only 117 miles, for which it can claim lands at 6,400 acres per mile or in all 748,800 acres, and it has received 796,929.14 acres or an excess of 48,129.14 acres over all it can claim, *even without excluding* any claim for Indian lands in the Osage Ceded Lands *reservation* (Printed Record 10–13). See *Chicago*, St. Paul M. & O. Ry Co. case, 6 Land Dec. 215.

If it were necessary to ascertain the facts, a reference could be made to a master to do so.

In *Sioux City R. R.* v. *Chicago Ry.*, 117 U. S. 406, in a *controversy between two railroad companies*, a decision was made settling their respective rights, and the case *was remanded to the Circuit Court in which a Master was appointed to determine what lands each should take.*

If this was done to ascertain the rights as between *rival railroad claimants*, it may be done to settle rights as be-

tween the *United States and a railway company, and the rights of citizen settlers upon the lands*, unless for some reason Railroad Companies have rights which the Government and citizens can not have.

But no reference is necessary, *if the M. K. & T. Co. is not entitled to indemnity for lands lost in the forty miles of land grant for the Kansas Pacific Road and the A. T. & S. F. Road.*

The whole question is therefore now open for decision. Some facts now become material.

The act of July 1, 1862—12 Stat. 493, Sec. 9—made a land grant to Leavenworth, Pawnee & Western Railroad Company. This was enlarged by act of July 2, 1864—13 Stat. 358, Sec. 4–12—at which time that company was called the Union Pacific Railroad Company, Eastern Division, and afterwards and now the Kansas Pacific. The grant to this company was of all the alternate odd sections for twenty miles on each side of its line. The M., K. & T. Company only claims indemnity even sections by virtue of the act of 1866.

The road of this company commences a Junction City on the line of the Kansas Pacific, near Fort Riley, and for the first twenty miles south of that point passes through the land grant limits of that road. *M., K. & T. Co.* v. *Kansas Pacific Co.*, 97 U. S. 494.

It also passes through twenty miles of the land-grant limits of the A., T. & S. F. Road. Act March 3, 1863, 12 Stat. 772.

The whole road made by the M. K. & T. Co. is only 157 miles.

In view of these facts, the M., K. & T. Co. is not entitled to indemnity lands in lieu of any of the granted lands within the limits of the grants in aid of the Kansas Pacific, and the A., T. & S. F. Companies.

The M. K. & T. Co. is not entitled to to indemnity for lands lost in the forty miles of grant for the Kansas Pacific and A. T. & S. F. Companies.

A similar question was decided in the Department of the Interior by Secretary Lamar July 26, 1887—6 Land Decision 47.

The act of July 12, 1864, (13 Stat. 72) makes a grant for the Sioux City Railroad and for the Chicago & Milwaukee Railroad, the latter of which intersects the former, and so there was an overlap in the granted and indemnity limits.

On the 26th of July, 1887, Secretary Lamar decided that neither company was entitled to indemnity lands in lieu of what was taken by either from the other in the overlapping granted limits. He said:

> I do not think that Congress granted or intended to grant more than a moiety to each company in the common granted limits. To say that it intended to do more than this, would be to say, in effect, that in so far as the ten mile limits of the two grants overlap, the purpose of the granting act was to make what would amount to a double grant. Each company [The Sioux City & St. Paul and the Chicago, Milwaukee & St. Paul which succeeded to grant made for the use and benefit of the McGregor Western Co.,] got a moiety of the lands in odd numbered sections, within the common granted limits. Now, should there be allowed to each company indemnity

for the moiety lost by grant for the other, a quantity of land equivalent to all the odd and even numbered sections in said common granted limits would be passed under the granting act.

This, in my judgment, would not be justified by any proper construction of the act, nor can I conceive it to have been intended by Congress.

The grant was of a moiety for each road within the common granted limits of the two roads. Either this is true, or Congress by the same act twice granted the same lands. To say that it did or intended to do this, would be to say that it acted unreasonably, or without a proper understanding of what it was doing. I am satisfied that the grant by the act of 1864 was, so far as the granted limits of the two roads overlap, a grant of "every alternate section of land designated by odd numbers for ten sections in width on each side of said roads" for the common benefit of the roads. This accords with the view expressed by the Supreme Court in the case of *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 720.

Now since indemnity is allowed only for lands granted or intended to be granted and lost from the grant, and since in the common ten miles of the two roads only a moiety was granted for the benefit of each, it follows that the Sioux City Company, one of the beneficiaries under the grant, has no legal claim for indemnity on account of the moiety granted for the benefit of the other company.

Copp's Land Owner, Vol. XIV., Sept. 15, 1887, p. 139. And see the *Chicago, St. Paul, M. & O. R. R. case*, Oct. 7, 1887, Copp. Nov. 1, 1887, p. 179; *Sioux City & St. P. R. R. case*, July 26, 1887, Copp. Nov. 15, 1887, p. 189.

The same result follows in effect from the decision of Secretary McClelland under the act of September 20, 1850–1, Lester 521, re-affirmed Nov. 23, 1887, by the Interior Department, 6 Land, sec. 348, holding that Ohio under the swamp land act, could not claim *indemnity* for alternate sections reserved in reimbursement for lands granted by previous legislation.

And the statute and authorities show that the M., K. & T. Co. was and is not entitled to *receive any grant of lands within the forty miles mentioned, and is not entitled to any indemnity lands for those portions of its road.*

(1.) *This is the effect of the words of the statute.*

The act of July 26, 1866 (14 Stat. 289), provides that:

> There is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile.

If this *stood alone*, it would be on its face a grant of five *odd-numbered sections* on each side of the road from Fort Riley to the Osage Indian Reservation. But this grant is *qualified* and *limited* by the same act in the same section, as follows:

> *Provided*, That any and ALL LANDS HERETOFORE RESERVED to the United States by any act of Congress, or IN ANY other MANNER BY COMPETENT AUTHORITY FOR the PURPOSE of AIDING IN ANY OBJECT OF INTERNAL IMPROVEMENT or other purpose whatever, be, and the same ARE HEREBY, RESERVED AND EXCEPTED FROM THE OPERATION OF THIS ACT, except so far as it may be found necessary

> to locate the route of said road through such reserved lands, in which case the right-of-way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States.

That is, the *grant* does not extend to the odd sections which had been *previously granted* to the Union Pacific R. Co., Eastern Division [now called the Kansas Pacific], and to the A., T. & S. F. Co. *These* lands are RESERVED and *excepted* "FROM THE OPERATION OF THE ACT" of July 26, 1866. The latter act *makes no grant*, and hence *gives no indemnity* rights within the *granted limits* of the two roads mentioned.

The lands so *previously granted*, are expressly "RESERVED [FROM] AND EXCEPTED FROM [OUT OF THE GRANT] THE OPERATION [GRANT] OF THIS ACT."

The Supreme Court has so decided.

Thus, in *L., L. & G. R. R. Co.* v. *U. S.* (92 U. S. 247), it is said:

> Every tract [of land previously] *set apart for special uses* [as lands previously granted for the use of a railroad] is RESERVED to the Government to enable it to enforce them. There is no difference in this respect, whether it be *appropriated* for Indian *or* OTHER PURPOSES. There is an equal *obligation* resting on the Government to require that neither *class* of RESERVATIONS be diverted from the uses to which it was assigned. * * *
>
> Whatever is *included* in the *exception* is *excluded* from the *grant*. * * * What is not given expressly, or by necessary implication, is *withheld*. * * * Congress could not be supposed to have

> * * * intended to include [in the grant] the land previously appropriated to another purpose. (*Id.* 740.)

And in *Newhall* v. *Sanger* (92 U. S. 762), the same principle is announced.

The Court, in considering "the subject of grants" and referring to the preceding case, said:

> We held that they [grants] did not embrace tracts RESERVED by competent authority for *any purpose*, or in any manner, although no exception of these was made in the grants themselves; and we confined a grant of every alternate section of "land" to *such* whereto the *complete title was absolutely vested in the United States.*

The provision for *indemnity* in the act of July 26, 1866, is as follows:

> But in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, GRANTED AS AFORESAID, or that the right of pre-emption or homestead settlement, has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid.

Now, as the act gives indemnity for only lands which were "GRANTED AS AFORESAID" by the act, but

lost to the Company subsequently by *sale*, or *homestead*, or *pre-emption entries*, the act does not give "lieu" or "indemnity lands" in place of lands *never granted*, but expressly RESERVED from the grant.

This is the clear meaning of the words of this statute, and if there can be doubt as to that it is to be resolved against the Company.

This is the view supported by authority.

In the case of *L. L. & G. R. R. Co.* v. *U. S.*, (92. U. S. 749), Mr. Justice Davis, in discussing the *indemnity clause* of the act of 1866, said:

> The words employed [in the indemnity clause] show clearly that its only purpose is to give sections beyond that [ten mile] limit for *those lost* within it by the action of the Government *between the date of the grant and the location of the road*. This construction gives effect to the whole statute, and makes each part consistent with the other.
>
> But even *if the clause were susceptible of a more extended meaning* IT IS STILL SUBJECT TO, AND LIMITED BY, THE PROVISO WHICH EXCLUDES ALL LANDS RESERVED AT THE DATE OF THE GRANT and NOT SIMPLY *those found to be reserved when the line of the road shall be definitely fixed*. The latter contingency had been provided for in the [indemnity] clause, and if the *proviso* did not take effect until that time it would be wholly unnecessary.

This opinion seems to receive some sanction in the later case of *U. S.* v. *Burlington, etc., R. R. Co.*, (98 U. S. 339), in which it is said:

> That nearly all, perhaps all, other grants of land in aid of the construction of railroads, prescribe a

lateral limit within which the [indemnity] land is to be selected; *and provide for the selection of land elsewhere to make up any deficiency arising from the disposition of a portion of it within such limit*, BETWEEN THE DATE OF THE ACT AND THE LOCATION OF THE ROAD.

So much of the opinion in *L., L. & G. Co.* v. *U. S.* as says that indemnity lands can only be given for lands "LOST," that is, *sold* or taken by *homestead* or pre-emption entries, within granted limits—

> By the action of the government *between the date of the grant and the location of the road*—

has been criticised and said to be "*mere dictum.*" Att'y-Gen'l Devens, June 5, 1880, 16 Opinions, 512; *Winona & St. Peter R. R. Co.* v. *Barney*, 113 U. S. 618, 627; Rep. Sec'y Interior, 1887, vol. 1, p. 375.

But the *other declaration* of Justice Davis remains unquestioned, to-wit, that the indemnity clause—

> IS STILL SUBJECT TO AND LIMITED BY THE PROVISO WHICH EXCLUDES ALL LANDS RESERVED AT THE DATE OF THE GRANT, *and not simply those found to be reserved when the line of the road shall be definitely fixed.*

That is, NO INDEMNITY IS TO BE GIVEN FOR LANDS WITHIN GRANTED LIMITS WHICH WERE RESERVED *at the date of the grant.* The lands *previously* granted in aid of the two companies mentioned were expressly reserved from the grant of the act of July 26, 1866.

This was distinctly the view of the Attorney-General, although he held that other language of Justice Davis was *mere dictum*, as stated.

Thus, Attorney-General Devens, in his opinion of June 5, 1880, (16 Op. 513), on the indemnity clause of the act of March 3, 1857, (ch. 99, 11 Stat. 195), said:

> It gives the company NO TITLE TO INDEMNITY for LANDS RESERVED FROM AND EXCEPTED OUT OF THE GRANT, but does entitle it to indemnity when within the granted limits there are found lands which have been *sold* by the United States, or PRE-EMPTED, whether such *sale* or *pre-emption took place prior or subsequently to the passage of the act of* 1857, and prior or subsequently to the definite location of the road. But this *indemnity can be carried no further* than to compensate the railroad for THE lands which it has THUS *lost*.

This question is clearly decided in *M., K. & T. Co.* v. *U. S.*, 97 U. S. 760; *U. S.* v. *Burlington Ry.*, 98 U. S. 334, 337.

The principle thus announced as to *reserved lands* is not disturbed, but rather affirmed, by this court per FIELD, *Justice*, in *Winona & St. Peter R. R. Co.* v. *Barney*, 113 U. S. 624; s. c., 117 U. S. 228.

In that case it appeared that the act of March 3, 1857, (11 Stat. 195), granted lands to the Territory of Minnesota in aid of the construction of certain roads, and gave indemnity rights. The Winona & St. Peter R. R. Co. succeeded to the rights of one of these companies. The act of March 3, 1865, (13 Stat. 526), enlarged the grant from six to ten sections per mile, with indemnity limits twenty miles. PRIOR to the act of 1865 a grant had been made to aid in the construction of the Minnesota & Cedar Valley Railroad, "of lands *located within the limits covered by said extension* grant."

A question arose as to indemnity rights under the act of 1857, and the court *held*—as the syllabus of the case says—

> That the grant by the act of 1857 was a grant of lands *in place*, and not of *quantity*.

And it was *held*:

> That the indemnity clause in this act (of March 3, 1857) covers losses from the grant by reason of SALES, and the ATTACHMENT OF PRE-EMPTION rights *previous to the date of the act*, as well as by reason of sales and the attachment of pre-emption rights between that date and the final determination of the route of the road.

But it is *not said* that a company is entitled to *indemnity* for lands within the limits of its grant, which had been *previously granted* to another company, and which were thereby *reserved* from the later grant.

The lands of the Minnesota & Cedar Valley Company, at its intersection with the Winona & St. Peter R. R. Co., were located within the limits of the extension made by the act of 1865 to the original grant of 1857.

A question arose as to which of the two companies was entitled to the lands included in the extension grant, and the court *held*—

> That when the earlier grant to aid in the construction of the Minnesota & Cedar Valley Railroad interferes with the extension grant, * * * the earlier grant takes the land.

The earlier grant *reserves* the land from the later grant. And it is not said at all, that indemnity is to be given to

a later company for lands it loses within its granted limit by a previous grant or reservation.

This is further shown by the whole purpose and policy of the land-grant system.

(Copp's Land-Owner, July 15, 1886, vol. xiii, No. 8 p. 92; *Rogers* v. *Atlantic & Pacific R. R. Co.*, (Copp's Land-Owner, Sept. 15, 1886, vol. xiii, No. 12, 135.)

THE CONCLUSION *is inevitable that the M., K. & T. Co. received no land grant or indemnity rights within either the twenty-mile granted limits of the Union Pacific R. R., Eastern Division, or within the twenty-miles of granted limits of the A., T. & S. F. Co.*

The averments of the bill show that the whole line of road from Junction City [Fort Riley] to the North boundary of the Osage Indian Reservation is 125 Miles, and that assuming that there is no right for indemnity lands in the Osage Indian Reservation there are only 85 miles of road entitled to land grant rights or only 544,000 acres.

During the year 1887 this land grant was adjusted under the direction of Secretary Lamar (6 Land Dec. 276, 144) as required by the act of March 3, 1887 (Stat. p. 556), and the Commissioner of the General Land Office in his Report for 1887 shows that the total excess of lands patented to the M., K. & T. Co. over and above the amount to which it is entitled is 293,431.55 acres, including 21,421.99 acres patented to it of lands outside of and beyond the indemnity limits. See Rep. Secy. Interior, 1887, Vol. 1, p. 131, 375. Of these lands, the excess within granted limits is 21,307.86½, the excess within

indemnity limits 250,486:17½ acres, and 21,421.99 outside of indemnity limits.

The excessive issue having thus been shown, the United States has a right to reclaim the last lands patented including those mentioned in the bill.

And if it were necessary the case can be remanded for reference to a master as in *Sioux City R. R. Co.* v. *Chicago Ry.* 117 U. S. 406. But this is not necessary, as *all* the lands claimed and *more* should be restored to the United States.

REPLY TO THE ARGUMENT FOR DEFENDANTS ON THIS SUBJECT.

The act of July 26, 1866, makes a grant in place of "every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate sections per mile on each side of said road not exceeding in all ten sections per mile." It provides that indemnity lands shall be selected "from the public lands of the United States *nearest* to the sections above specified."

It was urged on behalf of defendants in the Circuit Court that *the last lands patented* are not *the* lands to be reclaimed, but those *most remote* from the sections granted *in place* or as the argument said:

> No patent for land at a distance of nineteen miles, can be cancelled so long as any patent for land at a distance of twenty miles is permitted to stand, and no indemnity selection at a distance of eleven miles can be reclaimed, if a reclamation of all lands at a greater distance would reduce the grant to within proper limits.

Before replying to that it is proper to say, the lands in controvery are *all claimed* by the M., K. & T. Ry. Co. *as indemnity lands outside of its granted limits.*

THE REPLY, to the argument for defendants is as follows:

I. The law *presumes* that up to the last excessive issue of patents for indemnity selections the Secretary of the Interior *approved indemnity selections* in *proper location*—"nearest to the [granted] sections."

The maxim of the law applicable to such presumption is well understood—*omnia praesumuntur rite et solenniter esse acta donec probetur in contrarium* 12 Wheat 70.

All having been thus *rightly done* until the *last excessive issue* the legal *wrong* is in *that* and hence the *last patents* are to be cancelled.

II. This is the rule (1) of *public policy* (2) *expediency*, and (3) of *equity*. So long as there was *no excessive issue* of patents, *purchasers* and *mortgage creditors* of the Railroad Company, had a right to rely on the validity of patents issued. If a *purchaser bought* lands patented, or if a *creditor* took a mortgage on lands, up *to the time when there was no excessive issue*, if the United States should file a bill to cancel some of the patents on the ground that *remote lands* had been patented when *nearer lands* should have been, any Court in such case would say as this Court said in the *Brewster* case—

> While we are not disposed to hold the action of the officers of the Land Department as absolutely conclusive upon such a subject as this, we see no reason why their deliberate action, with careful attention

and all the means of ascertaining what was right should be set aside in this case. (See *Maxwell* land grant case, 121 U. S. 381.)

The Court would, up to the point of *excessive issue*, apply an *equitable estoppel*, the *grantor* and *grantee* both having acquiesced in the patents.

Look at the consequence of a different rule.

A Railroad Company receives its indemnity lands in *proper amount*, but not the *nearest* to the *granted sections in place*. It gives a mortgage on the lands so patented.

It then receives patents for an *excessive* amount of land in proper location and becomes insolvent.

The Government then institutes a suit to cancel the patents for the *mortgaged lands*, and leaves the *last lands* patented untouched.

This would work great injustice to a mortgagee, and in *such case*, the Court would turn the Government over to its remedy on the *last lands patented*.

The Bill in this case and Exhibit B show that the M. K. & T. Co. has executed various mortgages to different mortgagees, and made conveyance to sundry parties, of course all at different dates, and on different parcels of land. And it is equally certain that *other lands* under *prior patents* when there was no excessive issue have been sold and mortgaged.

All are chargeable with notice of the rights of the United States and settlers in possession. But as among such purchasers and mortgagees it is perfectly clear, on every principal of equity that those having claims on the

first lands patented are to be protected, and those having claims on the *last lands* patented are to be preferred and protected

THE CONCLUSION *is inevitable that the last patents for excess lands should be first cancelled.*

SIXTH PROPOSITION.

I AS TO LANDS ON WHICH HOMESTEAD OR PREEMPTION CLAIMS WERE SUBSISTING AT THE DATE OF THE GRANT—JULY 26, 1866—EVEN THOUGH SUBSEQUENTLY ABANDONED, NO INDEMNITY RIGHT ATTACHED.

II AND NO INDEMNITY RIGHT ATTACHED TO LANDS WHICH PRIOR TO THE DATE OF SELECTION BY THE SECRETARY OF THE INTERIOR HAD BEEN COVERED BY HOMESTEAD OR PRE-EMPTION ENTRIES.

The bill alleges that *two classes* of homestead and preemption claimants, have *equitable* rights to some of the *even* sections in controversy:

I. Those who took the proper steps to secure such right prior to the act of July 26 1866, and have ever since occupied the lands they claim, and

II. Those who *prior to the selection* of the lands for indemnity made settlement and tendered compliance with the homestead and preemption laws, but were refused, because the Commissioner of the General Land Office had March 19, April 3, 1867, unlawfully, and in express violation of section 4 of the act of 1866 withdrawn the even sections between the ten and twenty mile limits from entry [see letter printed record p. 32, 33] and the lands have been patented to the R. R. Co. as indemnity lands.

These claimants have ever since asserted their rights and occupied the lands.

Here are meritorious classes of claimants whose claims in law, equity, and morals, strongly appeal for careful consideration.

The claims of *each class* will be considered.

FIRST CLASS.

I. *Those who made settlement prior to the act of July* 26, 1866.

Of these there may be two classes (1) those who in all respects complied with the law and (2) those who on July 26, 1866, had *inchoate* rights with occupancy but *subsequently* failed to perfect their claims.

1. Beyond all question, those who made settlement prior to July 26, 1866, and complied fully with the law are entitled to be protected.

2. Those whose rights were *inchoate* with occupancy July 26, 1866, but who subsequently failed to comply with the law are equally entitled to protection.

As the bill in this case avers there are such claimants, they may be illustrated by a single one of the cases. The Commissioner of the General Land Office under date of December 31, 1885, addressed a letter to the undersigned, in which he said:

> The W. ½, S. E. ¼, Sec. 2, Tp. 26, S. R. 20 E., is situated in the indemnity limits of both grants. The records show that Newton L. Ard filed D. S. No. 2115 for the tract, July 14, 1866, alleging settlement the same day. A hearing was had at the local office September 9, 1872, but before any action was taken

by this office on the evidence adduced at the hearing, the tract was selected by the Mo., Kan. & Tex. Ry. Co., and patent issued for the same November 3, 1873; November 19, 1877, this office rejected the claim of Ard, and on appeal the Secretary refused to disturb that decision. * * * At the time of the hearing he (Ard) had a house and out-buildings on the land, and about 75 acres under fence and cultivation. It was *then* held *that the right of the company attached to indemnity lands* at the same time it did to granted lands, and it was held that his was not a legal pre-emption *at that date*. The Secretary in his decision cited the case of *Moore* v. *Robbins*, 96 U. S. 530, as a precedent for the determination of Ard's rights in the courts. [8 Op. Att'y-Gen. 246.]

Since his case was acted on by the department, the Supreme Court of the United States has *placed a different construction upon the law* as to *when* a company's right to specific indemnity tracts attaches. *Ryan* v. *Central Pacific R. R. Co.*, 99 U. S. 386. [*St. Paul R. R. Co.* v. *Winona R. R. Co.*, 112 U. S. 730.] It was there held that a company's right to indemnity attaches to no specific tract until selection has been actually made. At the time the company selected the tract occupied by Ard [April 14, 1873], he had a dwelling and out-buildings on the land, and had under cultivation and fence about 75 acres of the land. His claim to the land antedates the grant to said company, and his right thereto was paramount, it did not therefore fall within the provisions of said grant. He was in laches, but for that reason alone the company's right could not vest. That was a question between the government and himself, in which the company should have no voice, [Copp. L. O., Vol. 11, p. 219, 314; *Emerson* v. *Central Pacific R. R.*, Vol. 3, Sec'y Decisions, 117; *Id.* 166; *Id.* 227; *Id.* 490;

Id. 305; *K. P. R. R. Co.* v. *Dunmeyer*, 113 U. S. 629] for at the date of selection he had valuable improvements on the land, and was in actual possession thereof—and it was no longer public land, and subject to such selection.

It is now well settled that land *so occupied*, was not subject to indemnity selection, and that even the cancellation of the pre-emption claim would not make it subjection to indemnity selection, but it would revert to the *United States*, relieved of any claim by the railroad company: *Newhall* v. *Sawyer*, 92 U. S. R. 761; *M. K. & T. R. R. Co.* v. *Noyes*, 25 Kas. 340; *Ryan* v. *Central Pacific R. R. Co.*, 99 U. S. 386; *St. Paul R. R. Co.* v. *Winona R. R. Co.*, 112 U. S. 730; Copp's Land Owner, vol. 11, pp. 219, 314; *Emerson* v. *Central Pacific R. R. Co.*, vol. 3, Land Decisions Sec. Interior, 177, 166, 227, 490, 305; *K. P. R. R. Co.* v. *Dunmeyer*, 113 U. S. 629. See Act of Congress April 21, 1876, 18 Stat. 35, and Act June 15, 1880, 21 Stat. 236; *L. L. & G. R. R. Co.* v. *U. S.*, 92 U. S. 741; *A. T. & S. F. R. R.* v. *Rockwood*, 25 Kas. 292; *Perkins* v. *C. P. R. R. Co.*, Decisions Int. Dept., 1881–3, p. 357. And in *Union Pacific R. R. Co.* v. *Simmons*, the Secretary of the Interior held, October 4, 1887, that a settlement right defeats the claim to indemnity, "though such [settlement] right was subsequently abandoned without legal assertion." XIV Copp's Land Owner, Dec. 1, 1887, page 203.

It was in view of such cases as this that Congress passed the acts April 21, 1876 (19 Stat., 35), and March 3, 1887 (Stat. 556), in behalf of settlers to *waive* the failure fully to perfect pre-emption claims, and enable them to secure patents.

THE ACT OF CONGRESS OF APRIL 21, 1876—19 STAT. 35.

This act was designed to secure the rights of settlers who had filed declaratory statements under the pre-emption laws, or had made entries under the homestead laws prior to notice to the proper local land office of the withdrawal in favor of any Railroad Company of lands from such settlement. The settlers here can not *now*, have any relief under that act. In the case of *Wisconsin Central R. R. Co.* v. *Stinka*, Secretary Lamar decided, January 25, 1886, that no relief could be granted to a settler while there was an outstanding patent to a R. R. Co. Vol. 4 Interior Dept., Land Decisions, 344. A similar decision was made June, 1888, as to lands patented to the Wisconsin Central R. R. Co., in Ashland County. See 2 Op. Atty. Gen'l. 41; 5 Op. 7; *Streeter* v. *M., K. & T. R. R Co.* February 7, 1878, Schurz, Secy. Int. Rep., 1878, Part 1 p. 63; Rep. Com. Gen'l Land Office, 1878.

THE ACT OF MARCH 3, 1887, STAT. 556.

This act requires the Secretary of the Interior to adjust the land grants for R. R. companies. It provides that if it be found that lands have been erroneously certified or patented to or for any company, the Secretary shall demand of the company a release to the United States, whether within granted or indemnity limits, and if such company neglects or fails to reconvey within ninety days, it shall be the duty of *the Attorney General to commence and prosecute suits to recover such lands.*

Then section 5 provides, as to lands in the *bona fide* occupation of adverse claimants prior to 1882, under the

pre-emption or homestead laws, and which while so occupied were sold by any R. R. Co., that the occupants *shall be permitted to perfect their proofs and entries, and receive patents therefor.*

This act has been construed in case of Adjustment of Railroad grants 6 Int. Dept. Land Dec. 272; same p. 276.

Under these Statutes the Secretary of the Interior demanded of the R. R. Co. a release of its claim, to certain lands, including that of Ard, which the company has refused to make, and *after this suit was commenced*, C. H. Pratt claiming under the Railroad Company prosecuted a suit in the State Circuit Court in Allen County against Ard to recover this land; he recovered the land in that Court, the judgment was affirmed by the Supreme Court of Kansas in 1890 *Ard* v. *Pratt* 43 Kansas Rep. 420. And the case is now pending *on* error in this court. That case held that Pratt under the patent had the *legal title*, it said nothing of the right to cancel the patent, nor of the right of Ard under the act of 1887. It did not pass on the question whether the land was *reserved* from indemnity selection, which can *now* be decided.

A graver wrong than that presented by this case, or one more loudly calling for speedy relief can not well be imagined.

And this leads now to a consideration of:

THE SECOND CLASS.

Those settlers who prior to the selection of the lands for indemnity made settlement and tendered compliance with the law but were refused, because the lands had been with-

drawn from market by letter of the Commissioner of the General Land office by letter March 19, *April* 3, 1867.

The letter of withdrawal was sent to the local land office, because of the mistaken view *then* held, but since decided to be wrong, that the right to indemnity lands attached at the same time with granted lands, on the filing of the map of definite location of road.

It is therefore proper to ascertain *when* the right of any railroad company *could* attach to any of the *even* sections now in controversy, even if they were subject to indemnity selection—as they were not—for that is *the time up to which* homestead and preemption entries might be made.

The act of July 26, 1866, gave a right to select for the M., K. & T. Co. some but not *all even sections* as indemnity lands within twenty miles of its road outside of all granted limits.

But no right to any indemnity land could vest in such company until the *completion* of its entire line of road. This has been the general policy, as indicated by clear provisions of *nearly all*, the land grant acts, and the *exceptions* made in *express terms* in *some* granting acts prove the general rule.

This road was not completed until July 9, 1870.

No title to indemnity lands could vest in the R. R. Co. until they were *lawfully* at the proper time selected by the Secretary of the Interior.

The act of 1866 says:

> It shall be the duty of the *Secretary of the Interior to cause to be selected* for the purposes aforesaid [indemnity or lieu lands] from the public lands of the

> United States nearest to the sections above specified [granted lands] so much land as shall be equal to the amount of such lands as the United States have sold, *reserved*, or *otherwise appropriated*, or to which the *right of homestead settlement* or preemption has attached as aforesaid, which lands *thus indicated* shall be reserved, &c.

This question is settled.

Substantially the same words are found in the act of March 3, 1863, (12 Stat. 772.) In *Kansas Pacific R. R. Co.* v. *Atchison, Topeka & Santa Fe R. R. Co.*, 112 U. S. 421, Miller, J., in considering their effect, said:

> The grant to Kansas, as stated, *conferred only a right* to select land *beyond ten miles* from the defendants' road upon certain contingencies. *It gave no title to indemnity lands in advance of their selection.*

On a similar question in *St. Paul R. R. Co.* v. *Winona R. R. Co.*, 112 U. S. 731, Miller, J., approving the language of *Ryan* v. *R. R. Co.*, 99 U. S. 382, said:

> With respect to the lieu lands [indemnity selections] as they are *called*, the right was only a *float*, and attached to no specified tracts until the *selection* was actually made in the manner prescribed. The same idea is suggested, though not positively affirmed, in the case of *Grinnell* v. *R. R. Co.*, 103 U. S. 739. In the case of the *Cedar Rapids R. R. Co.* v. *Herring*, 110 U. S. 27, this principle became the foundation, after much consideration of the judgment of the court.

And the learned justice proceeds in an emphatic manner to show that *until a selection is made of the lieu lands*, by the Secretary of the Interior, they are *subject to the homestead entry and to preemption*. He says:

> The reason of this is that, as no vested right can attach to lands in place—the odd numbered sections within [ten] miles on each side of the road—until these sections are ascertained and identified by a legal location of the line of the road, so in regard to the lands to be selected within a still larger limits their identification can not be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections or parts of sections within the primary limits have been lost by sale or pre-emption. It may be still longer before a selection is made to supply this loss. Was there a vested right in this company during all this time, to have not only these lands but all the other odd sections within the twenty mile limits, on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation and forbidden to cultivation?

See *Kansas Pacific R. R. Co.* v. *Dunmeyer*, 113 U. S. 637.

The selections of indemnity lands for the M., K. & T. Co., in Allen county, were made as follows:

> Of odd sections within the overlapping indemnity limits of the two roads August 8, 1872.
>
> Of even sections within the same overlapping limits, April 14, 1873, July 29, 1874, and Nov. 7, 1876.
>
> Of even sections within the ten-mile limits of the L., L. & G. road as overlapped by the indemnity limits of the M., K. & T., April 14, 1872, list approved October 14, 1873.

And hence *up to* the *approval of* these selections, *settlers had a lawful right to make pre-emption and homestead entries;* yet the right to do so was unlawfully denied to them after the withdrawal letters of March 19, 1863, as to the L., L. & G. Co., and of March 19, 1867, as to the M., K. & T. Co.

Whatever may be the right of the M., K. & T. Co., as to even sections, to which no pre-emption or homestead right attached prior to the approval of these selections, settlers should now have the benefit of a suit to cancel patents, issued for lands to which homestead and pre-emption rights attached prior to such approval.

This withdrawal was as to the indemnity odd and even sections wholly illegal and void. This is so because the act of July 26, 1866, gives *no authority* in terms for such withdrawal. *Kansas Pacific R. R. Co.* v. *A. T. S. F. R. R. Co.*, 112 U. S. 422.

On this subject, the Commissioner of the General Land Office in his annual report for 1885, says:

> The granting acts generally make no provision for official withdrawals. Granted lands were to be identified by the definitely fixed location of the line of the road. Until then the grant did not attach to any land, but all lands on the line of the proposed road remained within the disposable power of the government and subject to settlement and entry.
>
> An official withdrawal of lands from appropriation and disposal under the public land laws before the time arrived when the right of appropriation and disposal was concluded by the lawful identification of granted lands was clearly an act of wrong to the

government and an injustice to settlers, while of great and improper advantage to railroad corporations.

Such withdrawals have, however, been made, such wrong and injustice perpetrated upon citizens and the government, and such advantages secured by grantees upon whose request and for whose benefit the withdrawals were ordered. In the early period of the land grant system erroneous views seem to have been entertained in respect to what constituted a fixed definite location, and premature withdrawals followed from that error. In later periods withdrawals appear to have been made without regard to legal construction, and apparently without consideration of official responsibilities.

Whenever Congress has deemed it proper, *special authority* has been given to withdraw from market lands within indemnity limits in advance of the completion of a road and of the selection of the lieu lands. Thus section 7 of the act of July 1, 1862 (12 Stat. 489), provides:

> That within two years * * said [Kansas Pacific Railway] Company shall designate the *general route* of its road as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from preemption private entry and sale; and when any portion of said route shall be *finally located*, the Secretary of the Interior shall cause the said lands heretofore granted to be surveyed and set off as fast as may be necessary for the purpose herein named.

Section 4 of the act of 1866 provides "that as soon as said Company [M. K. & T.] shall file with the Secretary

of the Interior, maps of its line * * it shall be the duty of said Secretary to withdraw from the market the lands GRANTED by this act."

This does not apply to *indemnity* lands. It is the sole authority for withdrawal, and it is *limited* to GRANTED lands. There can be no withdrawal as to *indemnity* lands.

The case of *Cedar Rapids, &c., R. R. Co.* v. *Herring*, 110 U. S., 41, and the cases therein cited conclusively show that as against homestead and pre-emption claimants, there is no authority to withdraw indemnity lands from settlement *until the entire line of road is completed*, and that even then, no right is vested in a Railway Company *until actual selection of the indemnity lands* "; and possibly not then until the selection is approved by the proper officer."

This is the doctrine of Grinnell v. R. R. Co. 103 U. S., 742; Van Wyck v. Knevals, 106 U. S., 360; Ryan v. R. R. Co., 99 U. S., 382.

In the case of the Cedar Rapids road the act of June 2, 1864 (13 Stat. 95), unlike the acts now under consideration *expressly* authorized a withdrawal from settlement by saying

> That whenever said modified main line shall have been established or said connecting line located, the said Cedar Rapids and Missouri River Railroad Company shall file in the General Land Office of the United States a map definitely showing said modified line and said connecting branch as aforesaid, *and the Secretary of the Interior shall reserve and cause to be certified and conveyed* to said Company from time to time as the work progresses on the main line out of any public lands now belonging to the United States

not sold, reserved or otherwise disposed of within fifteen miles of the original main line an amount equal to that regularly authorized.

The whole subject of this proposition was discussed with signal ability in the case of *Burnham* v. *Starkey*, in the District Court of Allen County, Kansas, at January term, 1887, by Hon. L. Stilwell, J., in which he held a patent for indemnity land to the M. K. & T. Co., under the act of 1866, void as against a homesteader who settled on it prior to indemnity selection.

I append the report of that case to this brief.

The Supreme Court of Kansas reversed the decision of Judge Stilwell in that case *Burnham* v. *Starkey*, 41 Kansas Rep., 604, 1890, and that case is now pending on error in this court. The court did not pass on the question whether the land was *reserved* from indemnity selection, nor on the rights of the settler under the act of March 3, 1887. That act was overlooked or ignored. It held that the settler not having fully complied with the law had no remedy in equity to obtain decree for *title*. It overlooked the fact that he was *prevented* from complying with the law.

The *equitable* rights of the settlers are clearly proved by Judge Stilwell's opinion, and *the reversal by the State Court proves the necessity of granting relief now in this case as to the same land.*

The court had jurisdiction of these *lands, as also in the case of N. L. Ard, in this case, and of the controverted question of title when these cases were commenced in the State Court. Yet the State Court exercised jurisdiction notwithstanding* all this.

AFTER THE WITHDRAWAL SETTLERS EXCUSED FROM MAKING PROOF UNDER THE HOMESTEAD AND PREËMPTION LAWS.

After such illegal withdrawal settlers were not required to tender performance of any act under the homestead or preëmption laws. *Lytle* v. *Arkansas*, 9 How. 333; *Shepley* v. *Cowan*, 91 U. S. 333. *Burnham* v. *Starkey*, Kansas District Court, Allen County, January 1887, per. Stilwell, J.

It is well settled that a party is excused from doing a vain and useless thing. He can not be required to perform a condition precedent, which the government, by its wrongful act, has rendered unavailing: Shepley *v.* Cowan, 91 U. S. 330. See Van Wyck *v.* Kneavals, 106 U. S. 360; Ry. Co. *v.* Dunmeyer, 24 Kas. 725, s. c.; 113 U. S. 629.

This rests on the maxim, *Lex non cogit impossibilia*; and Broom says "the performance of a condition shall be excused by the default of the obligee * * if he do any act which renders it impossible for the obligor to perform his engagements: Broom's Legal Max. 242; 2 Parson's Cont. (6th ed.) 523; Bowery Nat. Bank *v.* Mayor, 63 N. Y. 336–340; Campbell *v.* U. S. 107, U. S. 410. See cases collected, 5 Lawrence's Comptroller Decisions, 24.

SETTLERS CAN IN THIS CASE CLAIM THE BENEFIT OF THE ACTS OF CONGRESS OF APRIL 21 1876 (19 *Stat* 35) AND MARCH 3 1887 (*Stat* 556).

These acts of Congress recognize the right of these claimants to protection from the courts.

They apply as well to lands within *indemnity limits*, as to those within granted limits. See *Adjustment Case*, 6 Int. Dept. Land Dec., 272, &c.

No demand on the R. R. Co., for a release is necessary to maintain this suit.

I. This suit was commenced before the act of March 3, 1887 was passed. It can not take away the *remedy* of the pending suit. *Dart* v. *Van Kleek*, 7 Johnson, 477; *Bruce* v. *Schuyler*, 4 Gilman, 221; *Hooker* v. *Hooker*, 10 Smedes & Marshall, 599; See authorities cited 1 Curwen's Ohio Stat. 10.

II. And the Attorney General, in an opinion, November 17, 1887, to the Secretary of the Interior, held that the right to issue patents under the fourth section of said act, does not arise until the land shall have been legally determined to belong to the United States. Copp's Land Owner, Dec. 15, 1887, Vol. XIV. p. 214.

III. The remedies provided by the act are *cumulative* —not exclusive.

It is only when a statute *creates* a right *and* provides a *special* remedy, that the mode it provides becomes exclusive. Bishop Written Law, 163–164; Sedgwick on Stat. (2d ed.) 31; Potter's Dwarris, 74; Maxwell Stat. (2d ed.) 186; Hardcastle Stat. 167–170; *Haycraft* v. *U. S.*, 22 Wall. 81; *State* v. *Marlow*, 15 Ohio St. 114; *Bachman* v. *Lawson*, 109 U. S. 660; *Pugh* v. *U. S.*, 13 Wall. 663.

REPLY TO ARGUMENTS FOR DEFENDANTS ON THESE SUBJECTS.

THE WITHDRAWAL OF LANDS FROM ENTRY.

1. The argument for defendants in the circuit court claimed that section 2258 of the Revised Statutes authorized the withdrawal of the indemnity lands from settlement by homestead and preemption claimants, on the ground that it is a "*Proclamation*" by the President. Rev. Stat., 453; *Patterson* v. *Totem*, 3 Sawyer, 164. *Wolsey* v. *Chapman*, 101 U. S., 220.

A SUFFICIENT REPLY *is*:

1. Section 2258 does not refer to such lands as these.

It says:

> The following classes of lands * * shall not be subject to the rights of preemption to wit
>
> *First*. Lands included in any *reservation* by any treaty, law, or proclamation * *

This relates to Indian and Military reservations, not to land grants for Railroads.

It does not apply to *homestead* claimants.

The Letters of the Commissioner of the General Land Office withdrawing lands from entry when *specially authorized by law*, have never been called or recognized as *Proclamations*.

It has been reserved for learned counsel to make the discovery or invention that such official *letter* is a *Proclamation*.

2. The argument for defendants says "no express authority is necessary to authorize a withdrawal."

A sufficient reply is:

It has already been shown:

1. That section 4 of the act of 1866 by *implication* excluded any authority to withdraw *indemnity* lands and

2. That no authority to withdraw exists except when specially authorized by act of Congress.

This is supported by the *Fort Boise Hay Reservation case* decided by Secretary Lamar July 7, 1887, 6 Land Dec., 16.

NO ADEQUATE REMEDY EXCEPT BY DECREE IN EQUITY.

It has been suggested that as to the homestead and pre-emption claimants—

> So far as any claim is made in reference to *particular tracts* upon which a homestead or pre-emption settlement was made *before any rights of the railroad company attached* is concerned, it is enough to say that equity does not interfere when there is a full and adequate remedy at law, and that *these parties can, under the settled practice in Kansas, obtain full protection of their individual rights without the interference* of the United States as plaintiff. 37 Federal Reporter, 68.

IN REPLY, I respectfully suggest—

1. In the cases of Starkey and Ard the Supreme Court of Kansas as already stated held there is no adequate remedy at law.

2. The remedy at law can not be "*complete* AND adequate" because there is an outstanding patent to the Railroad Company which is a cloud on the title of the settlers.

Why should a settler be required to remain without a

patent, on land to which he has a full equity but which no prudent man would buy of him?

Why should a settler be *driven* to litigate his title with a powerful Railroad Company, when he is entitled to a lawful patent from the government?

3. This claim of "an adequate remedy at law" overlooks the fact (1) that homestead or pre-emption claimants have a claim *on the government*, to *cancel the patents unlawfully issued*, and (2) a claim on the *government* to issue *other* patents to them, and (3) it overlooks the fact that if any one settler finally *refused to accept*, that the United States would have a right to the lands free from patents so unlawfully issued.

4. This court has in effect so decided. Thus in *U. S. v. San Jacinto Tin. Co.*, 125 U. S. 273. The syllabus says:

> 1 A suit may be brought by the United States in any court of competent jurisdiction to set aside, cancel or annul a patent for land issued in its name, on the ground that it was obtained by fraud or mistake
>
> The initiation and control of such a suit lies with the Attorney-General or the head one of the Executive departments
>
> 3 But the right to bring such a suit exists only
>
> [1] When the Government has an interest in the remedy sought by reason of its interest in the land;
>
> [2] *Or* the fraud has been practiced by the Government and operates to its prejudice;
>
> [3] *Or* it is *under obligation to some individual to make his title good by setting aside the fraudulent patent;*
>
> [4] *Or* the duty of the Government *to the public requires such action*"

5. The obligation of the United States to cancel the patents is not only recognized by the acts of Congress of April 21, 1876 (19 Stat 35) and March 3 1887 Stat 556, but it is made the express duty of the Attorney-General to prosecute *suits* for that purpose.

THE BILL SUFFICIENT.

Some objection is taken to the form of the bill as not sufficiently specific It is substantially in the same form as the bill in the *Brewster* case 118 U S 682 which went unchallenged so far as *this question* is concerned.

The defendants could in the court below have asked to make the bill more specific and certain and the failure to do so was a waiver of any such objection.

As a matter of fact, and as the bill avers it was not possible to specify all the settlers who had claims on specific tracts of land. That is matter for proof on reference to a master in chancery.

The court will not *sacrifice* the clear rights of settlers under an occupancy of more than twenty-one years.

As against them, the claim of the Railroad Company is itself *stale* and should be deemed barred in Equity.

THE RIGHT OF THE ATTORNEY GENERAL TO COMMENCE AND PROSECUTE THIS SUIT IS CLEAR.

As already shown it is affirmed in *U. S.* v *San Jacinto Tin Co* 125 U S 273

The United States has a right to have patents cancelled

1. If the lands were not subject to indemnity selection; or,

2. If patented in excess of the amount due the company; or,

3. If the M., K. & T. Co. *failed to earn* them by compliance with the law; or,

4. If the company has been guilty of a breach of "*conditions subsequent*."

On the *first* of these propositions it is sufficient to refer to the *Brewster case*, 118 U. S. 682; *L., L. & G. R. R. v. U. S.*, 92 U. S. 749

If the lands were not subject to, or were reserved from indemnity selection, the Secretary of the Interior would be without power to select them, and a patent issued therefor would be equally void. In the *Brewster case* the court said of such case:

> Unquestionably if there was no such power, the Government has a right by this proceeding to have those instruments declared void, and set aside as a cloud upon its title.

And that is precisely the character of these patents.

In such case there can be no innocent purchaser entitled to protection.

This is fully shown by the authorities. *U. S. v. Southern Colorado C. & T. Co.*, 5 McCrary, 570; Report Com'r Gen'l Land Office, 1886, pp. 34, 46, 75, 345.

And if the M., K. & T. Co. has received *more lands* than it is entitled to, or has constructed its road on a line not authorized, a court of equity will cancel the patents issued to it.

When the company comes into a court of equity its rights are to be measured by its *compliance* or *non-compliance* with the laws under which it makes claim. A court of equity has no dispensing power.

It is a Maxim in Equity Jurisprudence that "Equity follows the law."

The act of Congress of March 3 1887 Stat 556 recognizes the right and duty of the Attorney General to prosecute suits.

THE CONCLUSION *inevitably results, that the United States is entitled to a decree to cancel patents, to perform a duty it owes to settlers to give them patents.*

EQUITABLE CONSIDERATIONS—INNOCENT PURCHASERS.

A right reserved to the United States, as this is by Act of Congress, can not be denied, or its enforcement refused by a court of equity on any supposed or asserted equitable considerations. This would subvert the maxim *Aequitas sequitur legem*—equity follows the law, in explanation of which Story says:

"Where a rule, either of the Common or Statute Law, is direct and governs the case with all its circumstances, or the particular point, a Court of Equity is as much bound by it as a Court of Law, and can as little justify a departure from it. If the law commands, or prohibits a thing to be done, equity can not enjoin the contrary or dispense with the obligation." 1 Story Eq. 64.

But if a court of equity could disregard a statutory and a common law right, there is no circumstance here to justify such disregard.

When a party to a contract "evinces an intention no longer to be bound by [or perform] the contract," a court of equity will rescind it and restore what has been advanced on the faith of it. Bishop Cont. (2d ed.) 828; *Freeth* v. *Burr*, Law Rep., 9 C. P. 208, 213; *Mersey Steel*

Co. v. *Naylor*, 9 Q. B. D. 657; *Stephens* v. *Wilkinson*, 2 B. and Ad. 320; *Cox* v. *McLaughlen*, 54 Cal. 605; *Anderson* v. *Haskell*, 45 Iowa, 45; *Reed* v. *Golden*, 26 Kan. 500; *Griswold* v. *Alford*, 31 Miss. 224; *Warren* v. *Richmond*, 53 Ill. 52; *Little* v. *Thurston*, 58 Maine, 86.

A court of equity will reform a contract so as to do justice to the parties. *Ellinger* v. *Crowl*, 17 Md. 361; *Scott* v. *Duncan*, 1 Dev.-Eq. 407; *Rider* v. *Powell*, 4 Abb. Ap. Dec. 63; *Hutchins* v. *Pettingill*, 58 N. H. 386.

The authority of courts to go back of executive action is fully established. *St. Paul* v. *Winona*, 112 U. S. 733; *Steel* v. *Smelting Co.*, 106 U. S. 450; *Moore* v. *Robbins*, 96 U. S. 535; *Minter* v. *Crowlin*, 18 Howard, 87; *Polk* v. *Wendell*, 9 Cranch, 99; *Hall* v. *Gaines*, 22 Howard, 144; *Van Wyck* v. *Knevals*, 106 U. S. 360; *Dart* v. *Orme*, 41 Georgia, 376; *Fearns* v. *A., T. & S. F.*, 33 Kansas, 280.

It has already been shown that *laches* can not be imputed to the government—a doctrine founded "upon a great public policy." 5 McCreary C. C. 572; *Hart* v. *U. S.*, 95 U. S. 316; *Gaussen* v. *U. S.*, 97 U. S. 584.

It follows that a court of equity has no authority to ratify or give effect to usurpations of officers, or to wrongful or unauthorized acts of a railroad company.

The lands were unlawfully withdrawn from market by the Commissioner of the General Land Office, and thus settlers denied the privilege of preempting or perfecting preemption or homestead claims. In such case their rights subsist, notwithstanding the action of the officers. *Lytle* v. *Arkansas*, 9 How. 333; *Shepley* v. *Cowan*, 91 U. S. 330.

And as to all lands occupied by settlers at the time of any conveyance by the M., K. & T. Co. to any of its grantees, there can be no innocent purchasers.

The occupancy of the lands by the settlers long before the issue of the Governor's patent is *notice* of their claim; *Fearns* v. *A., T. & S. F.*, 33 Kan. 281; *Crews* v. *Burcham*, 1 Black. 352; *Kelly* v. *Stanberry*, 13 Ohio, 408; *McKenzie* v. *Perrill*, 15 Ohio St. 162; *Hughes* v. *U. S.*, 71 U. S. 281.

THE EQUITABLE CONSIDERATIONS ALL WITH THE SETTLERS.

But if the court could depose all law—as it will not—and resolve the rights of the parties on principles of conscience or supposed justice, the M., K. & T. Co. has no equity as against the settlers on these lands.

Prior to the act of 1866, and to this time—a period of more than twenty-one years—a numerous and respectable body of people, more than three hundred in number, pioneer settlers in Allen county, have in good faith asserted, as they yet do, a right existing by law to acquire title to these lands under homestead and pre-emption laws. They are in the actual occupancy of the lands they claim. Notwithstanding their long continued occupancy and claim, well known to the Interior Department, these lands were patented to the M., K. & T. Co., in 1873, 1875, 1876, and 1877.

With the settlers in possession and with no attempt by the Railroad Company to oust them for a long period of time the equities are with settlers.

How far the Court will take *judicial notice* of the condition of affairs as to these lands, the agitation and public history, and the official correspondence as to them, may not be certain, nor indeed important But IF the Court can properly do so, the history proves the equitable consideration all with the settlers

Before any of these patents were issued the validity of *any* railroad claim or title to these lands was in controversy. In 1874 the Land Commissioner of the L., L. & G. Co. published a pamphlet in defense of its claim of title. There was then in existence the "Grand Council of the Settlers' Protective Association," which organization caused to be published an able pamphlet, prepared by J. W. Pine, on "The Settler's Side of the Land Question," denying any right in the M. K. & T. Co. to the lands now in question.

As early as April 11, 1878, Hon. D. C. Haskell, M. C., applied to the Secretary of the Interior to have a suit commenced, and stating—

> That the settlers claim that the patents to the [R. R.] companies to much of the land were *wrongfully issued*, and that the title thereto should be yet in the United States, and they (the settlers) be allowed to enter them as in the case of other lands belonging to the United States

At an early date counsel were employed who advised the settlers that they were entitled to take the lands, and they have been in every legal mode endeavoring to receive a judicial decision on their rights.

On March 11, 1882, the Commissioner of the General Land Office by letter to Secretary Teller said he was—

> of the opinion that the certification of the lands in the odd-numbered sections within the overlapping limits East of the L., L. & G. Railroad *was erroneous* and accordingly *recommended the institution of a suit* in the name of the United States to set aside the Company's title to this particular class of lands.

As a result of correspondence referred to, suit was prosecuted to decree in August, 1885, when Judge Brewer declared the patents for these odd sections void, as the Supreme Court of Kansas had previously done in legal effect in *Neer* v. *Williams*, 27 Kansas, 1.

On March 11, 1882, Commissioner McFarland, while not concurring in the views of the settlers as to the even sections, yet in his letter to the Secretary of the Interior said:

> *I believe it the better course to have all the questions raised in the premises passed upon by the Courts, and so recommend.*

On the same subject Secretary Teller in his letter of August 5, 1882, to the Attorney-General, said:

> I have been unable to give the matter personal examination, and can not therefore advise authoritatively.

The rights of the settlers seemed to *need* careful examination.

He therefore made no decision.

On August 9, 1882, the Attorney-General transmitted to the U. S. Attorney for the district of Kansas the papers

on the subject of a suit, including the letter of Commissioner McFarland of March 11, 1882, *recommending suit as stated*, and the Attorney-General said:

> I therefore direct you to commence proceedings in the name of the Attorney-General to vacate the titles of the Railroad Companies above named and their grantees *to these lands*. * * * Before commencing suit, however, you will, as recommended by the Secretary, in whose views I concur, *make a thorough examination* of the facts and law of the case and proceed as directed above, if it shall appear to you that the patents have been improvidently issued.

The District Attorney, in his letter to the Attorney-General of December 22, 1882, said:

> I have, *to a certain extent*, examined the matter, but the duties of the office have been such that *I have not been able to give the thorough investigation to the questions involved* that I should like, considering the importance of the case.

It was unfortunate the claims of the settlers could not be *thoroughly* investigated.

He then says he is convinced that the courts will hold that the odd sections east of the L., L. & G. road within the overlapping indemnity limits of the two roads, were improvidently patented to the R. R. Co. He accordingly commenced suit to cancel these *patents* with the result well known. *Brewster case*, 118 U. S. 682.

As to the *even sections* now in question he said:

> I am not satisfied that the patents for these lands were wrongfully issued.

This, of course, is to be taken in connection with his statement that he had "not been able to give the *thorough investigation* to the questions involved" that he should like.

On July 20, 1885, the settlers on these lands applied to the Interior Department with a request that suit be brought to settle the title. On the 16th of June, 1886, Secretary Lamar, concurring with the Commissioner of the General Land Office, held in an able opinion that the lands were unlawfully patented to the M., K. & T. Co. and asked the attorney-general to commence suit to reclaim the lands if in his judgment "upon further examination such suit be deemed advisable." 4 Land Decisions, 573. On an examination the Acting Secretary of the Interior reaffirmed the opinion so given December 17, 1886. 5 Land Decisions, 280. This was made in view of the *Brewster case*, 118 U. S. 682. The Attorney-General seems to have concurred in these opinions, because he deemed it advisable to commence this suit.

Thus the only time the rights of the United States have been carefully and fully considered, the claims of the settlers have been vindicated.

The M., K. & T. Co. permitted the settlers to go upon these lands without protest or objection. They are now on the lands with the opinion of the law officers of the government in their favor.

There is another reason why the M., K. & T. Co. can acquire no equitable title to these lands within indemnity limits, or at least cannot invoke the aid of a court of equity now. The letter of the Commissioner of the General Land office of March 19, 1867, *unlawfully* withdrew from future homestead and pre-emption entry—

> *All* the odd-numbered sections, within the *ten*-mile limits and *all* the vacant lands between the *ten* and *twenty*-mile limits—

of the M., K. & T. Road, *including the lands now in controversy.* The *illegality* of this withdrawal has been shown by the authorities already cited. (*St. P. R. R. Co.* v. *Winona R. R. Co.*, 112 U. S. 731). It is fair to presume—current history, judicially noticed, proves—that if this land grant had been lawfully administered, *every acre* of these lands would have been taken by settlers before the alleged selection of indemnity, *April* 10, 1873 (Printed Record, 58 [104] in the *Brewster case.*)

Settlers were unlawfully denied their rights under the acts of Congress. And now *this court* is asked to *sanctify* this *grave mistake*, not to say enormity or outrage on their rights, and to aid the M., K. & T. Co. in obtaining lands which by every principle of justice and law should have been left open to be taken, and if so, would have been taken, by settlers.

It may not be *proved* that every acre of these lands is now covered over with homestead and preemption entries, which will become available if the United States obtains a decree establishing its title in this case. But if not so proved, a court of equity will not aid the M., K. & T.

Co. in holding lands to which settlers would have obtained titles under a lawful administration of the homestead and preemption laws.*

THE BREWSTER CASE.

THE CASE OF KANSAS LAWRENCE CITY, & SOUTHERN KANSAS R. R. CO. v. BREWSTER, ATTORNEY-GENERAL, 118 U. S. REP. 682, FOR BREVITY CALLED "THE BREWSTER CASE."

It seems to have been supposed that the *Brewster case* had some bearing on the case now before the court. M. K. & T. Case 5 Int. Dept. Land Dec. 281.

In view of what has already been said I respectfully submit that it will not be necessary for the court further to consider *that case*.

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* The record in the *Brewster case* (Print 68, 71, [126]–[131]) shows lists of lands patented to, or certified in favor of, the M., K. & T. Co.

The act of Congress of July 1, 1864, does not make *any* grant or give any indemnity rights SOUTH OF EMPORIA. Yet lands were given to the M., K. & T. Co. south of Emporia, under THE ACT OF JULY 1, 1864, as follows:

Lands *south* of Emporia within the ten-mile limits of the grant:

June 19, 1872, per list 6	7,767.41
May 31, 1873, per list 8½	13,603.55
	21,370.96 acres.

Lands *south* of Emporia in the twenty-mile (indemnity) limits of the grant:

June 19, 1872, per list No. 7	6,818.97
May 31, 1873, per list No. 8½	34,593.72
	41,417.69 acres.

This will serve to show the utter misconstruction of this land-grant act, with the *error in favor of the railroad company*, and *against settlers*.

But in a matter of so much importance as this, it is perhaps better not to omit any possible subject, which may in any event, affect the result

With the most profound respect for the opinion in the *Brewster case*, and with great deference, I respectfully submit that there is reason to suppose it was based on some *misapprehensions of fact*, and *some mistake as* to the effects of the statutes considered therein

The *Brewster case* reached a different conclusion from that of Secretary Lamar, Attorney General Garland, the District Attorney who commenced the suit, and Judge Brewer who decided it in the Circuit Court

If it be necessary, a re-examination of the questions decided may be properly asked for the purposes of this case—

But it is first of all urged that the opinion in that case sustains the claim of the United States in this case

That case related to (1) *odd* sections, (2) in the overlapping indemnity limits of the M., K. & T. Road and of the L., L. & G. Road, that is, in the common indemnity limits of the two roads.

This case relates to *even* sections—all within the indemnity limit of the M., K. & T. Road, part within the granted limits of the L., L. & G. Road, and part within the common indemnity limits of the two roads.

In that case, the court passed on three points made by the United States against the title of M., K. & T. Road, two only of which it is material now to consider. One point was:

1. That the act of 1863 made a *subsisting* grant to the A., T. & S. F. Co. for a "*branch* road" from Emporia southward, which covered the lands in dispute, and that

the act of 1866 expressly reserved these lands from its indemnity rights, because the same lands were covered by the act of 1863.

Thus the court says:

> As the lands granted by the prior acts of 1863 and 1864 had, by the act of the legislature of Kansas, been granted to the Atchison, Topeka & Santa Fe Railroad Company, a then existing corporation of that State, for the purpose of building a road, with the same general description as to its course down the valley of the Neosho River, which might have run through these same lands if it had been built by the latter company, it is argued with great earnestness that these lands were necessarily reserved, under this clause of the act of 1866, from the grant, as being reserved by the authority of Congress for the purpose of aiding in that object of internal improvement. If the A., T. & S. F. R. R. Co. had built a line of road along the same general course and through the same lands, twenty miles in width, that the M., K. & T. R. R. Co. has occupied with its road, and asserted a claim to these lands, or to any of them, the argument would be almost irresistible.
>
> If, at the time that the act of 1866 was passed, the A., T. & S. F. R. R. Co., or any other company than the one to which the grant of 1866 was made, was intending to build a road, or expected to build one, or had any authority from the State of Kansas to build one, under the acts of 1863 and 1864, *the argument would have force.*

The court in effect said that the legislation and proceedings under it as to this "branch road" down the Neosho Valley gave to the M., K. & T. Co. all the rights of the acts of 1863, 1864 and 1866, and hence the objection was not well taken.

But the court in effect said that *if* the grant of 1863 for a branch road had been *subsisting*, as distinct from the grant for a road down the valley by the act of 1866 "the argument would have great force."

The court further say that:

> If the A., T. & S. F. (1) was intending to build a road, or (2) expected to build one, or (3) had any authority to build one under the acts of 1863 or 1864, the argument would have force.

And the syllabus condenses the argument of the court by saying:

> The acts of Congress of March 3, 1863, July 1, 1864, and July 26, 1866, granting lands to the State of Kansas for railroad purposes, are to be construed *in pari materia*, and as having the one purpose of building a single road from Fort Riley, down the Neosho Valley, to the southern line of that State, and not as distinct grants for different roads, which may come in conflict in the claims under them in regard to the lands granted.

This concedes—it substantially holds—that if the acts of 1863 and 1866 made "distinct grants for different roads"—then the act of 1866 would have operated to *reserve* from its granted or indemnity rights all the lands affected by the act of 1863. It is a direct authority in favor of the claims we now make that the act of 1866 cannot give any lands as indemnity which are in any way reserved or affected by the act of 1863, in its relation to the L., L. & G. Road. These acts made "distinct grants for different roads"—that is, for the L., L. & G. and the M., K. & T.

The court held that the acts of 1863, 1864 and 1866 superseded the Emporia branch—unified the grants—

> as having the one purpose of building a *single* road from Fort Riley down the Neosho Valley to the Southern line of that State, and not as distinct grants for *different* roads, which may come in conflict in the claims under them in regard to the lands granted.

Thus the court held on the point made by the United States—that there was one grant with indemnity rights for the Emporia branch by act of 1863, and this so appropriated the lands, that they could not be taken for a road under the act of 1866.

But the court say that:

> If the A., T. & S. F. R. R. Co. had built a line of road along the same general course and through the same lands twenty miles in width that the M., K. & T. Co. has occupied with its road, and asserted a claim to these lands or to any of them, the argument would be almost irresistible.

That is, when Congress makes a grant for one road [the L., L. & G. Ry. act of 1863] with granted and indemnity limits, and subsequently makes a grant for another road the [M., K. & T. Ry. act of 1866] with granted and indemnity limits, and there is a conflict in the common indemnity limits, the first act appropriates the alternate reserved sections, and the second act reserves them from the operation of the last named act.

This is the view taken by the Interior Department of the opinion of the Supreme Court in the *Brewster case*, 118 U. S. 682.

After Secretary Lamar had decided—as he did June 16, 1886 (4 Land Decisions, 573), that the patents now in

controversy were unlawfully issued—an application was made to the Secretary to have the suit dismissed on the ground that it had been in effect decided by the *Brewster case*, 118 U. S. 682.

The acting Secretary on December 17, 1886, refused the application, and said:

"I can find no reason in said decision for modifying the former recommendation" for this suit.

And he said of the decision of the Supreme Court:

> So far from militating against the said recommendation the court foreshadows a favorable decision in the case in question [this suit], for after stating the argument based on the above quoted proviso [the reserving proviso in the act of 1866] the court says: "If the Atchison, Topeka & Santa Fe R. R. Co. built a line along the same general course and through the same lands twenty miles in width that the M., K. & T. R. R. Co. has occupied with its road, and asserted a claim to these lands or to *any* of them [the odd sections in the overlapping indemnity lands of the L., L. & G. and M., K. & T. were in controversy], the argument would be almost irresistible."

The Acting Secretary, after quoting this, then says:

> Now this language describes just the status of the lands in question as far as they lie in the granted lands of the L., L. & G. Co. That company did build its road "through the same lands and asserted a claim to them."

Whatever effect the acts of 1863, 1864 and 1866 had in *unifying* the grants of those acts into one road, and one grant for one road down the Neosho Valley, it left, in the language of the syllabus of the *Brewster case*, "as distinct

grants for different roads which may come in conflict in the claims under them in regard to the lands granted"—the conflicting claims for the three roads as distinct roads, to-wit:

1. The L., L. & G. Road with its indemnity limits under the act of 1863.

2. The A., T. & S. F. Road with its limits under the the same act; and,

3. The M., K. & T. Road with its claims under the act of 1866.

They were not unified.

The rights of the L., L. & G. and of the A., T. & S. F., for their respective main lines, and the rights of the United States as *reserved* under the act of 1863—the *even* sections—all remained unimpaired by the act of 1866, and expressly reserved.

II. The second point made in the Brewster case by the United States is stated by the Court thus:

> It is said that the road of the M. K. & T. R. R. Co., which we hold to represent the grant of Congress under the statute [act of 1863] was not constructed "to the point where the L. L. & F. G. R. R. [now called L. L. & G.] *entered* the Neosho Valley" [12 Stat. 772 sec.—] but that those two roads joined at a point far within the entrance of the L. L. & F. G. R. R. [L. L. & G.] into the valley.

That is, the United States claimed that the M. K. & T. road did not run on the route, nor to the point required by the act of 1863. The act of 1863 required the Emporia branch to be made from Emporia "down said Neosho Valley to the point where the first-named road [the L. L. & G.] *enters* the said Neosho Valley" (12 Stat. 772).

To this the Court made two answers:

1. The Court said the construction of the act of 1863, 1863, contended for by the United States:

> Is too narrow a construction of the language describing the point at which the two roads * * were expected to meet and cross each other * *; the purpose of Congress was to make a grant of lands along the Neosho Valley to the Company which should build it, to the most appropriate point, wherever that might be, in this narrow valley at which the two roads might chance to come together.

And the court made a second answer as follows:

> 2. It is to be observed that this objection is raised under the language of the act of 1863, and that the act of 1866 contains no such requirement [that the two roads meet at the point described in the act of 1863] as that with reference to the crossing of the roads, it being declared in the latter act that the road is to be built down the valley of the Neosho River to the southern line of the State. Of course, if the act of 1866 is, as we suppose, supplementary to the act of 1863 and 1864, the description of the route of the road and its terminus in the latter act, is the one which governs the grant.

The effect of all this is—that the M. K. & T. Co. was not, for the *two* reasons assigned by the Court, bound to pursue the route which the United States claimed the act of 1863, required. The fact that the Court gave these reasons shows, that the M. K. & T. Co., would not have been entitled to any lands if it had failed to pursue the route—the exact route—required by the act of Congress.

The Court did not say that a R. R. Co., could make a road deflecting from the points or route required by law and still assert a right to lands.

This is important as an indirect but nevertheless an authority for saying that a R. R. Co., cannot claim lands if its road deflects from its line of definite location.

III. The third point made by the United States in the *Brewster case* is stated by court thus:

> Another objection urged to the ownership of the lands by this company * * is that the company has received more lands than it is entitled to under the grant.

The court answered this by saying that—

> The issue is not fully made on the bill," and "we do not think it necessary to enter into the details of the evidence of how much land was granted, how much was found in place and how much the road was entitled to as indemnity.

One Affirmative Principle.

Thus no question which is now made was then decided. And it may be inferred that the court in effect declared *one affirmative principle:*

That where a railroad company has *complied with the laws*, so as to be *entitled to lands*, and there is *informality* in the evidence of title given to it by the government, a court of equity will not disturb it.

In that case patents were issued to the M., K. & T. Co. by the governor of Kansas under the act of 1863 alone. That act did not name the M., K. & T. Co., nor otherwise give authority to the governor to issue patents. But the lands had been "*selected*" for the company.

And upon this the court said:

> It is true that when the M., K. & T. R. R. Co. made its application for the lands now in controversy, as indemnity lands, it asserted rights under the acts of 1863 and 1864 by virtue of the assignment of the A., T. & S. F. Co., and the ratification of that assignment by the State of Kansas, and also under the act of 1866 directly to that company; and it is true that the Secretary of the Interior, while acknowledging the claim to have been made under all the acts, certified the lands to the State of Kansas in accordance with the terms of the acts of 1863 and 1864, instead of issuing patents directly to the railroad company, *as was provided for in the act of* 1866. But since that company had all the rights conferred by *all three* of these statutes, and by the ratification by the State of Kansas of the transfer from the A. T. & S. F. R. R. Co., and since that state, after these lands were certified to it for the benefit of this company, issued to it patents of the State for those lands, it is obvious that *the company thus acquired the real ownership* and *the equitable interest in the lands* which it had *earned by building the road, in accordance with the provisions of all the statutes and all the contracts made upon the subject.* If there be any *informality in the attempt of the Secretary of the Interior and the State of Kansas to confer upon the railroad company the legal title* to these lands, it is for *the Company to seek relief* and to have those informalities corrected, not for the United States to set aside its solemn instruments in which those rights are evidenced, and under which not only the railroad company then interested, but its grantee, the present appellant, holds these lands or has sold them to *innocent purchasers.*

But the court rests its refusal to cancel the patents on the ground "that the company * * acquired the real ownership and the equitable interest in lands, which it had earned by building the road, in accordance with the provisions of all the statutes and all the contracts made upon the subject."

The fair inference is that if the company had not built "the road in accordance with the provisions of all the statutes and all the contracts made upon the subject," the court would have cancelled its patents.

And the position we now assume is that the M., K. & T. Company, as to the lands now in controversy, has not complied with either its contract or the statutes.

No general question as to deflection was made in the *Brewster case*.

The Brewster Case as Authority.

And certainly there are reasons why the *Brewster case* should not be held as authority beyond the precise lands covered by it. It is believed that case was decided on some misapprehensions. And if necessary, the Supreme Court may with profound respect be asked to reconsider its conclusions. While that case does *not* show that the lands *now* in controversy have been earned by any Company, it holds,

I. That—

> The acts of Congress of March 3, 1863, July 1, 1864 and July 26, 1866, are to be construed *in pari materia*, and as having the *one purpose* of building a *single* road from Fort Riley down the Neosho Valley

> to the southern line of that State [of Kansas], and *not* as *distinct grants* for *different roads*, which may come in conflict in the claims under them in regard to the lands granted.

The Court finds this purpose in *the three* acts—*not in one, not in two*, but only *in all*. The Court after referring to the act of 1863 as authorizing the Emporia branch, says:

> In 1864 Congress passed an act making an additional grant of lands to the State for a railroad from Emporia, by way of Council Grove, to a point near Fort Riley, on the branch Union Pacific Railroad in said State. *Both of these acts were accepted by the State of Kansas*, and both the lands granted, and the right to build the roads mentioned in these acts of Congress, *were conferred upon the A. T. & S. F. R. R. Co. by the State.*

The acceptance of the *act of* 1864, *by the State*, was thus regarded as a *necessary* part of that *unification*. No one pretends that there had been any acceptance by the State at *the date* of the act of 1866. The Court evidently regarded the Joint Resolution of February 26, 1867, as such acceptance, though it expresses no such purpose.

But at the October term, 1878, after the assignment and contract of March 19, 1866, and the Kansas *Joint Resolution*, the Supreme Court practically held that the act of 1864 was *inoperative* because *not accepted* by the legislature of Kansas. Thus, *in M., K. & T. Co.* v. *Kansas Pacific Co.*, 97 U. S. 499, FIELDS, J., says:

> This act of 1864 *was never accepted by the State* of Kansas. No route of a road between the points designated in it was ever located by the company, nor was

> any map of the proposed route ever filed in the Department of the Interior. Nothing, indeed, was done by the State or company under the act until after *the grant it offered had been* SUPERSEDED by the acceptance of the greater and more valuable grant made by the subsequent act of July 26, 1866, which covered the lands.

The *Brewster case* (118 U. S. 682) refers to an assignment made March 19, 1867 by the A. T. & S. F. Co. of its rights to the Emporia branch by saying that this Company "with the *assent of the State* [Joint Resolution] transferred all its interests in the grant to the M. K. & T. Co." But the *Court did not refer to what had been said by Field, J., in M. K. & T. Co.* v. *K. P. Co.*, 97 U. S. 499.

It may be inferred that Congress by the act of 1866 did not intend to give to the M., K. & T. Co., rights under the act of 1864, because Congress had *refused to consent to that portion of the Kansas act of February 9, 1864, asking that the Emporia branch should be extended northward to Fort Riley so as thereby to make one line of road.*

Congress did *not consent to extend the branch*, but made a grant for an *independent* road from Emporia to the Union Pacific road near Fort Riley, by the act of July 1, 1864, which, however, the State did not accept.

II. The Court in the Brewster case referring to the "Emporia Branch" and the road required by the act of 1864, says:

> These *two pieces of road*, if ever they were built, would *necessarily* constitute *one continuous road* from Fort Riley down the Neosho Valley to the point where the road should cross the line of the Leavenworth, Lawrence and Fort Gibson [now L. L. &

G.] railroad, and *this* is the road built by the M. K. & T. R. R. Co. under the act of 1866, and under its contract with the A. T. & S. F. R. R. Co. and the grants of the State of Kansas.

Let us see whether they would "NECESSARILY constitute *one* continuous road?"

1. The act of 1864 made a grant "to aid in the construction of a railroad from EMPORIA *via* Council Grove to a point *near* Fort Riley on the branch Union Pacific Railroad." This act fixed three points, Emporia, Council Grove, and *near* Fort Riley. The act of 1863 required a main line of road, "with a branch from where this last named road [the A. T. & S. F.] crosses the Neosho, down said Neosho Valley to the point where said first named road [the L. L. & G.] *enters* the said Neosho Valley."

When the act of July 1, 1864, was passed, it was not certain that the A. T. & S. F. road would cross the Neosho at Emporia—It was not required to do so—Its map of route was not adopted by the Company until August 10, 1866, filed in the office of the Governor of Kansas, November 7, and with the Secretary of the Interior, December 3, 1866. Record in *Brewster case*, 104 [58.] The act of 1863 required the Emporia branch to commence at the A. T. & S. F. crossing of the Neosho River *wherever it might be*—not necessarily at Emporia. The act of 1864 required a road starting at *Emporia*, whether the Emporia branch commenced there or not. The act of 1863 required the Emporia branch to run "down said Neosho Valley to the point where said first

named road [the L. L. & G.] *enters* the said Neosho Valley." The L. L. & G. could not "*enter*" the valley except on the north-*east side of the river*. The *branch* was thus required to *cross the river*. The M. K. & T. was not required to *cross* the river, and did not.

Thus it is respectfully suggested that it is a mistake to say that "these two pieces of road would *necessarily* constitute *one continuous* road," because *nothing in either the act of* 1863 *or* 1864 *requires them to "connect" at Emporia*, or to be operated in connection, or to require the M. K. & T. to run to the *point* where the L. L. & G. *enters* the Neosho Valley.

2. And it is respectfully suggested that the court is equally mistaken in saying—

> This is *the* road built by the M., K. & T. R. R. Co., under the act of 1866, and under its contract with the A., T. & S. F. R. R. Co. [the assignment of March 19, 1866] and the grants of the State of Kansas.

The "contract," like the act of 1863, required the M., K. & T. Co. to construct, UNDER THE ACT OF 1864 a MAIN LINE, and under the act of 1863 a BRANCH from the A., T. & S. F. crossing of the Neosho, to a point on the L., L. & G. road where it "enters" the Neosho valley, without any running connection. The court has properly said these "ARE TWO PIECES OF ROADS." *The* road as made by the M., K. & T. is not in "*two pieces*;" there is no *branch as one* "piece," nor does *the road* as made touch the L., L. & G. at the required point, but runs to one on *the South-West* side of

the river, "about eight or ten miles" distant from the admitted point where the L., L. & G. *enters* the valley. The M., K. & T. road is one continuous line—not "two pieces," as the contract required.

3. The act of 1864 required a road with its northern terminus to be "a point near Fort Riley on the branch Union Pacific Railroad." The act of 1866 required a road with its northern terminus at "Fort Riley or near said Military reservation." This did not require the roads to commence at the *same* point by any means. The Fort Riley reservation is over 2½ miles East and West. If one road commenced "*at*" its South-East corner and the other at the South-West corner, they would commence 2½ miles apart. But they were not required to commence "*at*," but "near" to it. In *Walker* v. *M. R. & L. E. R. R.*, 8 Ohio, 38, it appeared that a railroad was required to run "to or *near* Upper Sandusky." The court said that under this requisition "the selection of a route necessarily involves, to some extent, a discretionary power," and the court refused to disturb the location of a road, though it was 15 miles from Upper Sandusky.

If, as said by the court in the *Brewster case*, a branch road required to terminate "*at* the point where the L., L. & G. road enters the valley on the North-East side of the Neosho river, means "at the most appropriate point, wherever that might be," even "eight miles" distant from the point of entry and on the opposite side of the river, why may not the M., K. & T. road start on the Kansas Pacific, eight or even fifteen miles West of Fort Riley, and the road required by the act of 1864 fifteen miles East thereof, or a distance of 32½ miles apart?

4. The act of 1864 requires a road *via* Council Grove. The act of 1866 makes no such requisition. Did the act of 1866 *unify*, and make a partial repeal by implication? Repeals by implication are not favored; Railroads are.

5. The act of 1864 requires a road with a southern terminus at EMPORIA. The act of 1866 does not make Emporia a point—it requires a road "from Fort Riley, or near said military reservation; thence down the valley of the Neosho River to the southern line of the State of Kansas." It might run either east or west of Emporia. Did the act of 1866 again unify and repeal by implication?

6. The act of 1863 requires the Emporia branch as a *feeder* between the A. T. & S. F. Co. and the L. L. & G. Co. The act of 1866 requires a continuous line, in a large measure a *rival* to the other roads.

7. The act of 1863 requires a branch from the A. T. & S. F. crossing of the Neosho to the point where the L. L. & G. "*enters*" the valley. The act of 1866 does not require its road to run *through either* of these points. If the act of 1866 was intended to secure the same line of road as the act of 1864 and 1863, why did it not name the same points? The act of 1866 specially names the U. P. R. R. Co. S. B., [now M. K. & T.,] as the beneficiary to construct the road and secure the grant. If, as the Court says, the State accepted the act of 1864, it had a right, as the *Brewster case* says, "to employ such agency in the way of a corporation, private individuals, or its own officers, for the building of the road, as it might choose." How could the act of 1866 give rights to the M. K. & T. already or thereafter to be *vested* in the State

of Kansas? The conditions of the acts of 1863 and 1864 were *not* the *same* as those of the act of 1866. If the purpose of Congress had been to multiply evidences of a purpose to require three *separate distinct* roads, these acts were a success. If any evidence of a different purpose exists, it seems to lie in the hidden mysteries of construction.

It may be said that the "assignment" or "agreement" of March 19, 1866, *as between the two companies* parties to it, gave the M. K. & T. Co. a right to construct the road required by the act of 1864, and the Emporia branch required by the act of 1863, and that this was ratified by the Kansas Joint Resolution of February 26, 1867, by all which the State accepted the grant of the act of 1864, and the M., K. & T. Co. acquired a right to said road and branch. But when the act of 1866 was passed the assignment or contract had not been ratified by the Legislature, nor had the State accepted the act of 1864. The act of 1866 is to be construed according to its own terms, and the conditions *then existing*. Congress should not anticipate an acceptance or ratification by Kansas—neither was provided for or made conditions in the act of 1866, hence the act of 1866 is not to be construed with reference to matters which did not exist, and which Congress could not when the act was passed, presume would ever exist. Suppose the Kansas Legislature had never passed the Joint Resolution, would the M., K. & T. Co. have failed to acquire any rights under the act of 1866? Would not such loss in such case result from the reasoning of the Court? And besides, a Joint Resolution cannot change the effect of a statute. Const. Kansas Art. 2,

Sec. 15–20. *Rogers* v. *Crane*, 1 W. Va. 76. It can not transfer corporate powers. Const. Art. 12 Sec. 1. And the assignment could only be made by the *consent of Congress.* The act of 1866 does not refer to, or ratify any assignment. It does not provide for any.

The Court assumes that the act of 1866 was "*supplementary* to the acts of 1863 and 1864," and intended to unify the acts of 1863 and 1864 for the "single purpose of building one road down the Neosho Valley from Fort Riley to the point of intersection with the other [L. L. & G.] road"

This conclusion is reached, as it seems, chiefly on the mistakes of fact, (1) that the State of Kansas accepted the act of 1864; (2) that the road required by the act of 1864, and the Emporia branch required by the act of 1863, "would necessarily constitute one continuous road."

It must be admitted that if Congress intended such unification, it is marvelous that words were not employed more clearly to express it, in a country where words are so numerous.

8. The court refers to other evidences of the unification. One is, that on the 19th of March, 1866, the A., T. & S. F. Co. assigned its land grant rights, under the the act of 1864, and in the Emporia branch, to the M., K. & T. Co., which agreed to construct the road and branch; that—

> It is not to be *supposed* that Congress was *ignorant* of this transaction, nor that if the representatives in Congress in the State of Kansas, had been opposed to this transfer, they would have consented to the passage of the act of 1866.

Why it is to be supposed that congress knew of this arrangement, without any evidence on the subject, is not stated. It may, with equal propriety, be said: "it is *not to be supposed* that Congress was *informed* of this transaction." Statutes are to be construed on facts, not suppositions.

When the act of 1866 was passed the contract had not been ratified by the legislature of Kansas. The only attempt to ratify it was by the *subsequent* joint resolution of February 26, 1867.

Is it to be "*supposed*" that Congress would intend, by the act of 1866, to *unify*, without the assent of Kansas or any provision therein requiring such assent? That would not only be bad faith, but unconstitutional as impairing vested rights. If, as the court says, the act of 1864 "was accepted by the state of Kansas," that gave the state a right to make the road required by it, *either by its own agents* or such company as it might designate. Did Congress, by the act of 1866, repudiate the rights of the state? The state had not then surrendered any of its rights under the act of 1864.

If it be assumed, without evidence, that the representatives in congress, of the state, knew of the "assignment" or "contract," it may be equally assumed that they supposed the M., K. & T. Co. agreed to do just what the contract specified—build the road required by the act of 1864, and also the Emporia *branch*—not merge it in a new line of road. Their assent to the assignment, with nothing in its terms or purpose to show the merger, does not seem to be evidence of a purpose to unify the grants.

The court says:

> 9. It is a strained construction of the act of 1866, in the face of all the probabilities of the case, imputing to Congress, in which that state had two senators, and several members of the House of Representatives, great carelessness, to hold that they intended each one of these separate statutes [of 1863 as to a branch, of 1864 and of 1866] to stand by itself, and the claims to be asserted under them to be distinct grants for different roads.

The "probabilities" of the purpose to unify do not seem to be made apparent by any facts, or by the words of the act of 1866. The writers on the rules of construction have not laid down such probabilities as among them. Is is not a rather strained construction of the act of 1866 to give the M., K. & T. Co. the grants and benefits of that act, and of two other acts passed without reference to it? And with no *words* to show such purpose?

The court assumes that Senators and Representatives would have been guilty of "great carelessness" if they had permitted two lines of land-grant roads running southward from points near Fort Riley. The history of land grants shows that the securing of numerous grants was regarded as an evidence of vigilance and devotion to the interests of *those* who *controlled nominations* and *elections* of members of both branches of Congress.

It is notorious that one of the Kansas Senators—Pomeroy—was then popularly known as "Subsidy Pom," because of his skill in securing grants. This is history judicially noticed.

As a matter of fact the Senators and Representatives in July, 1866, knew that the act of July 1, 1864, had not

been accepted by Kansas; that Congress had refused to permit the Emporia branch to be extended north from Emporia: that no provision was made for a road from Fort Riley to Emporia, nor from Emporia to the south line of the State, and that the act of 1866 supplied this "long felt want" as a separate distinct line of road, which, as Field J., has said "*superseded*" the act of 1864, and hence did *not unify* it, nor give its rights to the M., K. & T. Co.

10. And how can either the "carelessness" or vigilance of members of Congress aid construction? If the Kansas members had *said* in debate in Congress, that the act of 1866 unified the grants of 1863 and 1864, a court can not refer to such debate to aid construction. *Aldrige* v. *Williams*, 3 How. 24: *Lessee* v. *Clark*, 12 Cal. 387, 425. *Taylor* v. *Taylor*, 10 Minn. 107: *Bank Pa.* v. *Commonwealth*, 7 Pa. St. 144; 6 Op. Att'y. Gen'l 464.

If what members of Congress *say* can not aid construction, how can any estimate of their carelessness or vigilance be so employed? If what they *say* can not be considered, how can a court consider what they *did not say* or do?

11. The roads and branches required by the act of 1863, *all* had specific purposes indicated by their respective *names*, *locations* and manifest utilities, as well as by the extent and topography of the country which they severally and collectively traversed. The road provided for in the act of 1866 had a distinct purpose indicated in its title, the connections it made, the region through which it passed, and the *extension* which it contemplated. The title of the act is—"An act granting lands to the

State of Kansas, to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas."

12. The court says that the act of 1866--

> Intending to ratify, make good, and add to the force of the title of that company [M., K. & T.] which it had derived from its agreements [March 19, 1866,] with the A., T. & S. F. Co., it did not leave it even *in the power of the State of Kansas* to confer these lands [granted by the act of 1864 and act of 1863 for Emporia branch] upon *any other company* than *this one*, and thereby prevented all conflicts of claims under these *several* grants.

If the purpose of *Congress* was to ratify the contract of March 19, 1866, it seems marvelous that no reference is made to it.

IS IT REPUDIATION?

If Congress by the act of 1866 intended to deprive the state of the power to require the A., T. & S. F. Co. to construct the "*branch*" as by *act of Congress* [of 1863] *and of the Legislature* of Kansas [act of February 9, 1864] required, it is respectfully asked—would this not be as flagrant a repudiation of the rights of the *State*, of the L., L. & G. Co, and of settlers, as could be enacted?

By the "contract" the M., K. & T. Co. agreed with the A., T. & S. F. Co. to construct *two distinct* "*pieces*" of road, to wit, *the* road required by the act of 1864, and the Emperia *branch*. The A., T. & S. F. Co. had a right to have this contract literally and exactly performed. The act of 1866 had not *then* been passed. The contract did

not contemplate any such act. Congress could refuse its assent to the contract. But could Congress *without the assent* of the A., T. & S. F. Co., by the act of 1866, release the M., K. & T. Co. from its obligation to construct *the* road and *the* branch as required by the contract? Is the act of 1866 to be so construed as to sanction the repudiation of a solemn contract? Congress could refuse to assent to the contract and thus require the A. T. & S. F. Co. to make the "branch." But Congress could not make a new contract for that company.

In July, 1866, the State had not accepted the act of 1864. Congress could *revoke* the grant made by the act of 1864. But the act of 1866 did not repeal or revoke that grant. It did not profess to make the same grant anew.

If the contrivances adopted have the effect to *unify* the acts of 1864 and 1866 and secure *all* the grants made by the former act, then the effect is to *cut off* the rights of homestead and pre-emption settlers in granted lands accruing between the date of the act of July 1, 1864, and that of the act of July 26, 1866.

There is a wide difference between regarding the act of 1866 as "superseding" the act of 1864, and as "supplementary" to it. If it was "superseded" it could neither be "supplemented," nor thereafter accepted by the State. The conclusion is believed to be inevitable that *all* the roads authorized by the acts of 1863 and 1866 were designed to be separate and distinct, and that the act of 1864 was inoperative.

It is said these "several statutes are to be taken and construed as *in pari materia*."

The generally received rule is that "all acts on the *same subject-matter* are to be taken together." Sedgwick, 247.

But if, as the court says, the acts of 1863 and 1864 require "*two pieces* of road,"—each *distinct* from the other—how does the act of 1866, having no reference to *pieces*, but to *one* distinct road, relate to the same subject-matter as the prior acts?

Effect of the Failure to Construct the Emporia Branch.

1. The M., K. & T. Co. did not construct its road from Emporia so as to pursue the route required by the act of 1863, for the branch from Emporia "to the point where the L., L. & G. Railroad *enters* said Neosho Valley." That point is on the North-east side of the river. The road is constructed from Emporia to a point on the L., L. & G. Road on the South-west side of the river "about eight or ten miles" from the point where the L., L. & G. Road "enters" the valley, and to a point where the road leaves the valley.

Upon the authorities *already cited* (*q. v.*), this failure to construct *to* said point of *entry*, would defeat all claim to land-grant or indemnity rights, along this portion of the road including the lands now in controversy.

If the act of 1866 was *unified* with the act of 1864, so as to leave the latter open to subsequent acceptance by the State in favor *only* of the M., K. & T. Co., it is marvelous that no words are found in the act of 1866 to indicate any such purpose.

2. The court says in the *Brewster case*, decided October Term, 1886, this view of the subject

> has been acted upon by the Land Department and by the various Secretaries of the Interior from that day [July 26, 1866] to *this* as the true construction of the statutes.

Is this correct?

On March 11, 1882, the Commissioner of the General Land Office in a letter to Secretary Teller expressed the opinion that the lands involved in the *Brewster case* were unlawfully certified to the L., L. & G. Co., and recommended the commencement of that suit (Record *Brewster case*, 78). The Attorney-General, and the Attorney of the United States for Kansas, concurred in this view.

On the 16th of June, 1886, Secretary Lamar decided that the patents for the *even* sections now in controversy were illegally issued, and recommended suit to recover them to the United States. 4 Land Decisions, 573.

Secretary Teller said August 5, 1882, "I have been unable to give the matter personal attention."

THE LOCATION OF THE EMPORIA BRANCH.

1. The court, inferentially conceding that if the M., K. & T. Co. failed to construct the branch from Emporia to the point on the L., L. & G. road required by the act of 1863, it could claim no land grant or indemnity rights under that act, for the portion of the road along the required branch, *gives construction* to that part of the act as to the location, and southern terminus of the branch,

which supports the location adopted. The *words of the act*, and the *construction* by the court may be thus exhibited:

Words of the Act of 1863.

"A branch from where the last-named road [A., T. & S. F.] crosses the Neosho [Emporia], down said Neosho valley to the point where the said first-named road [L., L. & G.] ENTERS the said Neosho valley—[that is on the North-East side of the river].

Construction.

"The act of 1863 made the grant to the state * for the purpose of aiding in the construction of a road * * *with a branch from where this road crosses the Neosho* [Emporia] down the valley of that river to the point where a road from Leavenworth and Lawrence south, for which a grant was made in the same act, CROSSES the Neosho valley."

"The purpose of Congress was to make a grant of lands along the Neosho valley, to the company which should build it, to *the most appropriate point, wherever that might be in this narrow valley, at which the two* roads [L., L. & G. and the Emporia branch] *might chance* to come together."

2. When the statute said the *branch* should run to a point where the L., L. & G. road *enters the valley*, the point was as definitely, certainly fixed, as it was possible for words to make it. To say that the word "enters" means "crosses," and that the latter means the "most appropriate point, wherever that might be in this narrow valley, at which the two roads might *chance* to come together," is at least a wide departure from the words of the statute.

How "narrow" the valley is, does not appear by any evidence. A route "down the valley" may mean a *wide* scope of country drained by the river.

In *Rex.* v. *Barrett*, 12 Ad. & El. 468, Pattison, J., said:

> I see the necessity of not importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty.

In *Everett* v. *Wells*, (2 Scott, N. C. 531,) Tindall, C. J. says:

> It is the duty of all courts to confine themselves to the words of the legislature—nothing adding thereto, nothing diminishing.

Substantially the same principles were sanctioned in *L., L. & G.* v. *U. S.*, 92 U. S. 749. The court says of this construction, and of the location of the road, "it is impossible to see how any substantial right of any person can be injured by it." The proper construction of a statute depends on the clear words and purpose of Congress, and in such case, not on the question whether it benefits or injures. 4 Kent, 330; *Blakemore* v. *Glamorganshire Canal*, 2 Mylne & K.

3. Is not the L., L. & G. Co. "injured" by a *rival* road, substituted for a *feeder* branch? Are not settlers who located lands on the faith of the location, and southern terminus of the branch, "injured" by a change in both? The court refers to the "solemn instruments" "under which not only the railroad company then interested, but its grantees, the present appellants, holds these lands, *or has sold them to innocent purchasers.*" If there was evi-

dence in the record of any sale to innocent purchasers, it has escaped notice. If current public notority were evidence the whole public knew of the claims of the settlers. Where there is no authority of law to issue patents, as where lands are *reserved* from indemnity selection, there can be no innocent purchaser from a patentee.

And the Court having said that the M., K. & T. Co., acquired at most, only an *equitable* title, there could be no *innocent purchaser*. "The rules respecting a purchaser without notice * * apply fully only to the purchaser of the *legal* estate. Even the purchaser of an *equity* is bound to take notice of any prior equity." *Vattier* v. *Hinde*, 7 Pet. 271; *Hallet* v. *Collins*, 10 How. 174; *Shiras* v. *Craig*, 7 Cranch 34. Some of the lands now in controversy purport to be *patented* under the acts of July 1, 1864, which was not in force South of Emporia, and so *no title* passed to the M., K. & T. Co.

4. The court did not decide that the M., K. & T. Co. had acquired *any title which would support a common law action of ejectment*, or had acquired a "right of possession" which would support an action to recover possession, under the usual Civil Codes of practice.

The court said:

> If there be any *informality* in the *attempt* of the Secretary of the Interior, and of the state of Kansas, to confer upon the railroad company *the legal title* to these lands, it is for *the company to seek relief* and to have those informalities corrected.

The inference is that the company needs relief to give it title or a *right of possession*. The act of 1866 requires

patents to issue from the United States, and in such case no right of possession passes until they issue. *S., C. & St. P. R. R.* v. *Osceola County*, 43 Iowa, 321.

The United States issued *no patent* for the *odd* sections to the M., K. & T. Co.

5. *Finally*, the court says, the objection that the M., K. & T. Road was not constructed to the proper point on the L., L. & G. Road "is raised under the language of the act of 1863," and that the "act of 1866 contains no such requirement as that with reference to the crossing of the roads, it being declared in the latter act, that the road is to be built down the valley of the Neosho River to the southern line of the state." And the court adds:

> Of course if the act of 1866 is as we suppose *supplementary* to the acts of 1863 and 1864, the description of the route of the *road* and its *terminus* in the latter act is the one which must govern the grant of lands.

The act of 1866 does not say it is supplementary to those of 1863 and 1864. The act of 1866 does not *expressly* repeal the requirement of the act of 1863 for a branch, nor its route or terminus. How the repeal by implication is made *clear*, as it must be to exist, is not apparent. Is the act of 1863 as to land-grant rights for the R. R. Co. kept *in force*, ante-dating the act of 1866 as against settlers, and *repealed* so far as it requires the R. R. Co. to pursue the route and reach the *terminus* of the branch required by the act of 1863? If that is the effect of the act of 1866, did Congress intend thereby to *repudiate* the rights of the L., L. & G. to have a branch with a route and terminus as prescribed in the act of 1863 on

the faith of which the L., L. & G. road was constructed? Have the settlers along that route and at that terminus no rights to be respected by Congress?

ON THE WHOLE CASE, IT IS CONFIDENTLY CLAIMED THAT THE RELIEF PRAYED FOR, SHOULD BE GRANTED.

Respectfully submitted.

WILLIAM LAWRENCE,
Representing settlers.

BELLEFONTAINE, OHIO, *February* 16, 1891.

SYNOPSES OF ARGUMENT.

William Lawrence, for settlers, submitted the following points and authorities:

FIRST PROPOSITION.

The acts of March 3, 1863, and July 26, 1866, expressly "reserve" these lands to the United States from indemnity selection.

This is so for at least *six* several reasons:

I. *Reason.—This proposition is conclusively sustained by* (1) *the history of Land Grant Acts;* (2) *by contemporaneous and long continued construction; and* (3) *by the fact that Land Grant Acts have been passed by Congress on the faith of the construction so given.*

1. History of land grants.

Missouri, Kansas, Texas Ry. Co. case, 4 Interior Department Land Decisions, 573.

2. Contemporaneous construction.

Secretary McClelland's decision, November 20, 1855, act of September 20, 1850 (9 Stat., 466), 1 Lester Land Laws, 521.

2. October 28, 1859.—Secretary Jacob Thompson decided that the act of June 3, 1856 (11 Stat., 17), granting

lands in aid of the Girard and Mobile R. R., reserved from indemnity selection all lands within the granted and indemnity limits of the Montgomery and Pensacola R. R., under the prior act of May 17, 1856. (11 Stat., 15.) MS. decision.

3. May 2, 1878.—Secretary Carl Schurz affirmed Secretary McClelland's decision of November 20, 1855. (4 Land Dec., 4.)

4. On May 2, 1878, June 28, 1880, and March 2, 1881.—Secretary Schurz, after taking the opinion of Attorney-General Devens, dated February 21, 1881, again affirmed Secretary McClelland's decision of November 20, 1855. (4 Int. Dept. Land Dec., 4.)

5. *June* 3, 1886.—Secretary Lamar, on land grant act of [June 10,] 1852 (10 Stat., 8), referred to in *Rogers* v. *Atlantic & Pacific Co.*, vol. 13 Copp's Land Owner, September 15, 1886.

6. *June* 16, 1886.—4 Int. Dep. Land Dec., 573.

December 17, 1886, Acting Secretary Muldrow.—5 Int. Dep. Land Dec., 280.

7. *September* 6, 1886, Acting Commissioner of the General Land Office, in *Rogers* v. *Atlantic & Pacific R. R. Co.*, under act of July 27, 1866 (14 Stat., 292), and act of June 10, 1852 (10 Stat., 8). See XIII Copp's Land Owner, Sept. 15, 1886, p. 135.

Alabama & Chattanooga R. R. Co. v. *Tennessee & Coosa R. R. Co.*, January 29, 1887, 5 Land Dec., 582.

II. Reason. The words employed in the acts of 1863 *and* 1866 *are clear and explicit in reserving these lands from indemnity selection.*

Their reserved character is so firmly fixed in our legislation that the act of June 8, 1872 (17 Stat., 333, Rev. Stat., 2304), gives soldiers a right to take them as homesteads for which purpose they are called, the alternate reserved sections of public lands along the line of any railroad or other public work."

This applies as well to lands reserved in the indemnity limits as to land reserved within the granted limits of a railroad.

III. *Reason. The reservation and disposition thus made of these lands was not changed by the subsequent act of July* 26, 1866 (14 *Stat.*, 289), *in favor of the M., K. & T. Co.*

This will appear for several reasons:

1. The act of 1866 expressly reserves these lands from the operation of its granting or indemnity provisions.

L. L. & G. R. R. Co. v. *U. S.*, 92 U. S., 747.

IV. *Reason. Another view of these statutes in connection with well settled rules of construction, leads to the same result. The act of* 1866 *can not subject these lands to indemnity selection for the M., K. & T. Co., without repealing the special provisions of the act of* 1863, *devoting these lands to special double-minimum pre-emption and homestead entries, and it has not so repealed them.*

Repeals by implication are not favored. *McCool* v. *Smith*, 1 Black., 459; *U. S.* v. *Taylor*, 104 U. S., 218.

This rule is conclusive against construing the act of 1866 as giving indemnity rights in these lands.

2. The general words of the act of 1866, giving indemnity rights in the "public lands," are to be so construed as not to apply to, or repeal the special provisions of the act of 1863 as to these lands.

Broom Legal Max., 646; Sedgwick Stat., 2d Ed., 360.

> An affirmative statute does not repeal a precedent affirmative statute; and that if the substance of both may stand together, they should both be enforced. Sedgwick 32; Potter's Dwarris, 74; *Wallace* v. *Holmes*, 9 Blatchford, C. C. 65.
>
> A thing which is given in particular shall not be taken away by general words. *Generalis clausula non porrigitur ad ea quae specialiter sint comprehensa.* Sedgwick, 361; Potter's Dwarris, 513, 668.
>
> Specific provisions * * are not repealed or affected by the general words of a subsequent statute. *Movius* v. *Arthur*, 95 U. S., 44; *Arthur* v. *Lahey*, 96 U. S., 113.

Fosdick v. *Perrysburg*, 14 Ohio St., 47, the rule is, see cases cited in *Huidekoper's case*, 3 Lawrence, Comptroller's Decisions, 161, to which latter case reference is made, not at all as authority but for a collection of cases.

The act of July 8, 1870 (16 Stat., 207), gave the common law action of case to a party whose patent right was infringed. The later act of June 1, 1872 (17 Stat., 197), adopted in general terms for the courts of the United States the State practice in each circuit including the so-called civil code practice and forms of procedure. This act was sufficiently general in terms to repeal the special action given in patent cases. But the revisers of the U. S. Statutes, and the courts, have held that the general statute adopting the code forms and practice, did not repeal or affect the prior special provision giving the action of case for infringement of patents. (See Rev. Stats., U. S. 4919, 914.)

V. Reason. Another consideration leads to the same conclusion:

After the acceptance of the act of 1863, *by Kansas, these lands ceased to be "public lands."*

This expression "public lands," has a fixed, well settled meaning for all purposes of railroad land-grant acts. "Yellowstone Park" is owned by the United States, and is in one sense "public land," but is not so within the meaning of land-grant acts.

Holden v. *Joy*, 17 Wallace, 211; *L., L. & G. R. R. Co.* v. *U. S.*, 92 U. S., 741; *U. S.* v. *McDougall's Adm'r*, 121 U. S., 89; *Five Per Cent. Cases*, 110 U. S., 471; *Kansas* v. *U. S.*, decided by Secretary Lamar, 14 Copp's Land Owner No. 9, August, 1887; s. c., Vol. 6, p. —; Land Decisions Interior Dept., *Newhall* v. *Sanger*, 95 U. S., 768.

VI. Reason. The act of 1886 was never in force as to these lands. This will be shown hereafter.

Reply to Argument for Defendants on this Subject.

The Brewster case, 118 *U. S.*, 682, *an authority for the Government over this first proposition.*

I. It has never been so understood and construed in the Interior Department.

After Secretary Lamar had decided—as he did June 16, 1886 (4 Land Decisions, 573), that the patents now in controversy were unlawfully issued—an application was made to the Secretary to have the suit dismissed on the ground that it had been in effect decided by the *Brewster case*, 118 U. S., 682.

The Acting Secretary on December 17, 1886, refused the application, 5 Land Decisions.

II. *So far as the Brewster case* (118 *U. S.*, 682) *affects any question now made, it is a direct authority in favor of the positions now assumed by the United States.*

That case, related to (1) odd sections, (2) in the overlapping indemnity limits of the M., K. & T. road and of the L., L. & G. road, that is, in the common indemnity limits of the two roads.

This case relates to *even sections*—all within the indemnity limit of the M., K. & T. road, part within the granted limits of the L., L. & G. road, and part within the common indemnity limits of the two roads.

The reasoning of the court shows that it supports the claim now made by the United States.

As to the even sections in the common indemnity limits of the M., K. & T. and the L., L. & G. Roads.

These lands were not subject to indemnity selection in favor of the M., K. & T. Co.

I. *Reason. The brief but forcible opinion of the Secretary of the Interior, as found in Vol. 4 of Land Decisions, 576, and its reaffirmance as found in Vol. 5, page 280, and the long line of decisions, and the usage of forty years already referred to, are submitted as a conclusive argument. These are supported by the concurrence of the Attorney-General, in deeming this suit advisable.*

II. *Reason. The acts of 1863 and 1866 expressly, or by clear inference, reserve these lands from indemnity selection.*

U. S. v. *Babbitt* (1 Black, 61); *Gelpeck* v. *Dubuque* (1 Wall., 220).

It follows that the *even* sections were by the act of 1863 *reserved* to the United States; they were by statute appropriated for homestead and pre-emption settlement; this was a part of the land-grant policy, on the faith of which the State of Kansas accepted that act, and thereby agreed to build the L., L. & G. road.

The act of 1866, in view of all this, affirms the reservation.

III. The same result follows from the "policy of alternation" established by the land-grant system; that is, the policy of reserving alternate sections for settlers. Act of May 17, 1856 (11 Stat., 15), act of June 3, 1856 (11 Stat., 17).

The Secretary of the Interior—Secretary Thompson—on the 28th of October, 1859, discussed the right to take indemnity within both the overlaps and decided that the "policy of alternation" prevented "solid blocks" of land from being taken.

Statutes are frequently construed directly against their words, when it be necessary to give effect to the real policy, purpose, and intention of Congress. *Silver* v. *Ladd*, 7 Wall., 219; *Brown* v. *Somerville*, 8 Md., 444.

The conclusion inevitably follows that the even sections in question were not subject to indemnity selections, but are subject to homestead entry.

The same principle applies to lands in the common indemnity limits of the two roads. *Gelpcke* v. *Dubuque*, 1 Wall., 220; *U. S.* v. *Babbit*, 1 Black, 61; *K. P. R. R. Co.* v. *The A., T. & S. F. R. R. Co.*, 112 U. S., 414.

By the act of March 3, 1863, the L., L. & G. Company acquired a contingent right to make its road and select the

odd sections as indemnity. This right continued by the act for ten years to March 3, 1873, and thereafter until the forfeiture act of July 24, 1876 (19 Stat., 101):

Schulenberg v. *Harriman*, 21 Wallace, 44; *Cross* v. *Carson*, 44 Am. Dec., 754.

While that contingent right was subsisting, and while said act of 1863 reserved the even sections from any subsequent grant or indemnity selection, the act of July 26, 1866, was passed expressly reaffirming all the prior reservations.

Thus no rights were given by the act of 1866 to the M., K. & T. Co. except such as it was then possible to assert so far as the even sections were concerned.

If we conceded as in this case we should not—that as to the indemnity odd sections in the overlapping indemnity limits of the two roads the company first completing its whole line of road, and first making indemnity selections of odd sections would gain priority (*St. Paul R. R. Co.* v. *Winona*, 112 U. S., 723), yet as the act of 1863 reserved the even sections "to the United States," they continue reversed under the act of July 26, 1866.

If the M., K. & T. Co., by its greater speed, received priority over the L., L. & G. Co. in the odd indemnity sections it could acquire no right as to even sections, because the L., L. & G. Co. could acquire no such right. The act of 1863 did not reserve priority as between the two companies as to odd sections, but in shutting out the L., L. & G. Co. from any even sections for indemnity, it equally shut out the M., K. & T. Co. from any even sections alternate to the odd sections.

The act of July 26, 1866, *did not authorize the selection of any even sections of land at any place for indemnity.*

This question is substantially decided in the Brewster case, 118 U. S., 600.

That assignment of March 9, 1866, was invalid, unless approved by Congress (*Coe* v. *R. R. Co.*, 10 Ohio St., 372). The act of 1866 as the opinion in the Brewster case shows simply ratified it, unified the grants into and for one road, with the same rights in the M., K. & T. Co. formerly held by the A., T. & S. F. under the acts of 1863 and 1864.

The purpose of the act of 1866 was not to make a new grant, not to enlarge indemnity rights, but in referring to indemnity land it had reference to the indemnity lands mentioned in the acts of 1863 and 1864, and no other.

There was no reason for enlarging the grant and no motive for it. When all the statutes are taken together the purpose is shown to have other objects, not one of which required an enlargement of indemnity rights. To apply the indemnity clause of the act of 1866 beyond this is to invoke the censure of the maxim *qui haret in litera haret in cortice.*

If the act of 1866 was supplementary to the act of 1863 to save to the M. R. & T. Co. the earlier land-grant rights of the act of 1863 against settlers, why is it not supplementary also to fix indemnity rights precisely as they were under the act of 1863? If it was supplementary to save previous rights to the M. R. & T. Co., why was it not supplementary to save to the United States its rights to even sections as under the act of 1863?

This view will reconcile the acts as one *in pari materia*, and will not subvert the "policy of alternation" maintained in all other land grant acts.

If the three acts were *in pari materia* for the purpose of saving prior rights to this railroad company why are they not *in pari materia*, to preserve the rights of the United States and of settlers?

IV Reason. The act of July 26th, 1866, was never in force or applicable to lands between Emporia [the A., T. & S. F. crossing of the Neosho] and the point where the M., K. & T. road crosses the L. L. & G. road.

Brewster Case, 118 U. S. 682. By this case the R. R. Co. secured the early land grant rights of the act of 1863 as against settlers on odd sections after that date—a great advantage to it over any grant which otherwise the act of 1866 could make.

But the court has not said, that on this portion of the road the act of 1863 ceased to be operative in its land grant effect, or that the act of 1866 did or could repeal, enlarge or add to the land rights given by the act of 1863, or was applicable to this portion of the road.

On the contrary, the court in effect held that the act of 1863 was the only act which for this portion of the road, gave such rights.

SECOND PROPOSITION.

The patents of the M., K. & T. Co. should be canceled, because its road deflects from the line of definite location.

Kansas Pacific R. R. Co. v. Dunmeyer, 113 U. S., 634.

The statute gives to the company a special limited power to locate its line of road. And this line so "def-

initely fixed" can not be subsequently changed, as it would be by constructing its road on a different line.

Ex parte Randolph, 2 Brock., 473; 10 Op. Att'y Gen'l, 259; *Crepp* v. *Durden*, 2 Cowper, 640; *Mills* v. *Collett*, 6 Bingham, 85; S. C. 19 Eng. Com. L. R., 11.

On May 10, 1869, Secretary Cox, of the Interior Department, refused application of the McGregor and Sioux City R. R. Co. for leave to file a new map of definite location.

Atkinson v. *M. and C. R. R. Co.*, 15 Ohio St. Rep., 32; *Morehead* v. *Little Miami R. R. Co.*, 17 Ohio Rep., 352; *Morehead* v. *Little Miami R. R.*, 17 Ohio, 340; *Little Miami R. R. Co.* v. *Naylor*, 2 Ohio St., 235; *Newton* v. *A. B. R. R.*, 15 Gray, 27; *Blakemore* v. *Glamorganshire Canal N. Co.*, 2 Mylne and Keene, decided in 1832; *Canal Co.* v. *Blakemore*, 1 Cl. and Fin., 262; *State* v. *Norwalk and D. T. Co.*, 10 Conn., 157; *Turnpike Co.* v. *Hosmer*, 12 Conn., 364; *Louisville and N. Turnpike. Co.* v. *Nashville and K. T. Co.*, 2 Swan (Tenn.), 282; *Williams* v. *H. and N. H. R. R.*, 13 Conn., 411.

If a person once determines his election it shall be determined forever.

(Comyn. Dig. title "Condition," Ch. 2; Co. Litt. 145; *Griffin* v. *House*, 18 Johnson R., 397; *Grinnel* v. *Chicago R. I. and P. R.*, 103 U. S., 739.

Attorney-General Devens, 16 Op., 462; *Van Wycke* v. *Knevals*, 106 U. S., 366; *K. P. Co.* v. *Dunmeyer*, 113 U. S., 629.

Statutes are not to be evaded, any more than they are to be disobeyed. Sedgwick Stat. (2d ed.) 74; *Hannay* v. *Eve*, 3 Cranch, 242; *Humphrey* v. *Cham-*

> *berlain*, 1 Kernan, 274. That which could not be done directly, * * * can not be done indirectly. 4 Coke, 24 *b.*; *Caldwell* v. *Mayor, etc.*, 9 Paige, Ch. 575; Broome's Legal Max. 832; Hardcastle Stat. Law, 24.

Grants are made and indemnity provided as compensation for each section of road, made on line of definite location. Where there is no such road, no land is earned. The completion of such road is a condition precedent (*Farnsworth* v. *M. & P. R. R. Co.*, 92 U. S., 65) to the right to lands; if this fails, the righ does not exist.

This principle is recognized in *Winona & St. P. R. R. Co.* v. *Barney*, 113 U. S., 628.

On February 16, 1857, Attorney-General Cushing said on this subject:

> That the state may lose this inchoate title [acquired under a land-grant act] by change of location. (8 Op., 390.)

The Supreme Court has determined that the acceptance by a railroad company of a land grant constitutes a contract between it and the United States, by which the company agrees to construct a road as required by the granting act. (*U. S.* v. *Central Pacific R. R.*, 118 U. S., 238.)

No officer can waive such location as the law requires. *Andrae* v. *Redfield*, 12 Blatchford, 407; 98 U. S., 225, *Whiteside* v. *U. S.*, 93 U. S., 256; *Lee* v. *Monroe*, 7 Cranch, 366. * * *

State v. *Hayes*, 52 Mo., 578; *Delafield* v. *State*, 26 Wend., 238; *People* v. *Bank*, 24 Wend., 431; *Mayor* v. *Reynolds*, 20 Md., 10.

The action of the Secretary of the Interior in certifying indemnity land selections along a deflected portion of road does not give any right to such lands. (*St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 733; *Johnson* v. *Towsley*, 13 Wall., 72, 80; *Gibson* v. *Chouteau*, 13 Wall., 92, 102; *Shepley* v. *Cowen*, 91 U. S. 330, 340; *Moore* v. *Robbins*, 96 U. S., 530, 536; 4 Kent. Com., 330.

Parsel v. *Barnes & Bro.*, 25 Ark., 261, 272; *Green, etc.*, v. *Beeson*, 31 Ind., 7; *State* v. *Bank of State*, 45 Mo., 528.

The power given by the land grant acts to the Secretary of the Interior and other officers, is a special statutory power, to be strictly construed and "must be pursued in strict compliance with the [express] terms of the statute." (Bishop, Written Laws, 110, and cases cited; Sedgwick on Statutes, 2d ed., 76.)

The construction of the road on the line of location is by the very terms of the statute, a "condition precedent" to the right to any lands. Thus in *Farnsworth* v. *M. & P. R. R. Co.* the court say: "The act made the construction of portions a condition precedent to a conveyance." *United States* v. *Central Pacific Co.*, 118 U. S., 238; *Virginia and Truckee R. R. Co.* v. *Lyons County*, 6 Nev., 68, 71; S. P., *City of Aurora* v. *West*, 22 Ind., 89; *State* v. *County of Davies*, 64 Mo., 30; *Ally* v. *Adams Co.*, 76 Ill., 101; Burroughs on Public Securities, 267; *Town of Platteville* v. *Galena*, 43 Wis., 492; Burroughs on Public Securities, 258; see State and county court, 64 Mo., 30.

Where one fails to perform his part of the contract, or disables himself from performing it, the other

party may treat the contract as rescinded. 1 Parsons Cont. 19; Bishop Cont. 677; *Bloomer* v. *Bernstein*, Law Rep. 9, C.P. 588; *Chamber of Commerce* v. *Sallitt*, 43 Ill. 519; *Morgan* v. *Bain*, Law Rep. 10 C. P. 15; *Suber* v. *Pullen*, 1 S. C. 273.

Knevals v. *Hyde*, 5 Dillon, C. C. 468.

And finally on this point the able Commissioner of the General Land Office, after a careful review of the authorities, in an opinion of September 12, 1887, said:

> In my opinion, the [C., St. P., M. & O. R. R.] company, by its failure to construct its road upon the line of definite location, abandoned its grant to the extent of the deflections. Vol. 1, Rep. Sec'y Interior, 1887, p. 378.

Conditions subsequent.—The Railway Company, by accepting the act of 1866, undertook the performance of "conditions subsequent," the failure to perform which forfeits the rights to indemnity lands. The obligation to construct the road according to agreement, on the line of definite location, was a "condition subsequent."

U. S. v. *Central Pacific Co.*, 118 U. S. 238.

Northern Pacific R. R. v. *Majors*, 5 Montana, 111, S. C. 14 Am. & Eng. R. R. Cases, 487; *Iowa* v. *Kirkwood*, 14 Iowa, 162; *Neer* v. *Williams*, 27 Kansas, 1; S. C. 10 Am. & Eng. R. R. Cases, 561; *Peck* v. *Rusk*, 10 Am. & Eng. R. R. Cases, 642; *St. Louis R. R.* v. *McGee*, 75 Mo. 522; S. C. 10 Am. & Eng. R. R. Cases, 649; *Swan* v. *Lindsey*, 70 Ala. 507.

Railroad Land Co. v. *Courtwright*, 21 Wall, 316.

U. S. v. *Central Pacific R. R.*, 118 U. S. 238; *Railroad Co.* v. *Courtwright*, 21 Wall. 316; 2 Parsons' Cont.

527; *Boone* v. *Eyre*, 1 H. Bl. 273 *n*; *Finley* v. *King*, 3 Peters, 374; *Davis* v. *Gray*, 16 Wallace, 203; *Hale* v. *Finch*, 104 U. S. 261; *Cowell* v. *Springs Co.*, 100 U. S. 55; *Close* v. *Burlington R. R.*, 64 Iowa, 149; S. C. 17 Am. & Eng. R. R. Cases, 35; *Blanchard* v. *Railroad Co.* 31 Mich. 43; 4 Kent, 122; Wright on Tenures, 196; Butler's, note, 84, Co. Litt. lib. 3.

Moorhead v. *Little Miami R. R.*, 17 Ohio, 353.

The right of the United States to require a judicial forfeiture for such a breach, is supported by the authorities.

C., C. C. & I. Ry. Co. v. *Coburn*, 91 Ind., 557; s. c., 17 Am. and Eng. R. R. Cases, 37. *Cross* v. *Carson*, 8 Blackf., 138 (44 Am. Dec., 742); *Leach* v. *Leach*, 4 Ind., 628; s. c., 10 Ind., 271; *Scott* v. *Stipe*, 12 Ind., 74; *Clark* v. *Halton*, 57 Ind., 564; see, also, *Rawson* v. *Inhabitants*, 7 Allen, 125; *Homer* v. *Chicago, etc., Ry. Co.*, 38 Wis., 165; *Hunt* v. *Beeson*, 18 Ind., 380; *Lindsey* v. *Lindsey*, 45 Ind., 562; 4 Kent., 132; 2 Pars. Cont., 499; Chitty Cont., 74; *Horner* v. *Chicago Ry.*, 38 Wis., 174. Decree accordingly.

Note to 17 Am. and Eng. R. R. Cases, 44; *Parmelee* v. *Oswego R. R.*, 6 N. Y., 74; 7 Barb., 599; *Underhill* v. *Saratoga R. R.*, 20 Barb., 455; *Jackson* v. *Florence*, 16 Johns., 47; *Palmer* v. *Plank Road Co.*, 11 N. Y., 389; *Blanchard* v. *Railroad Co.*, 31 Mich., 43.

CONSTRUCTIVE FRAUD.

The deflection of the road from the line of location is a constructive fraud on the United States, and on settlers, which justifies a denial of the right to indemnity lands.

Ex dolo malo actio non oritur.

Bishop Cont., 222; *Miller* v. *Howell*, 1 Scam. 499; *Dowd* v. *Tucker*, 41 Conn., 197; *Kinard* v. *Heirs*, 3 Rich. Eq., 423; *Richardson* v. *Adams*, 10 Yerger, 273; *Farrar* v. *Bridges*, 3 Humph., 566.

Martin v. *Martin*, 35 Alb., 560, *Garner* v. *Leverett*, 32 Alab., 410; *Bailey* v. *Jordan*, Id., 50; *Abbott* v. *Allen*, 2 Johns., ch. 519; *Parham* v. *Randolph*, 4 How. (Miss.), 435; *Edward* v. *McLeary*, Cooper Ch. Cas., 308; 2 Swanst., 302. 2 Story Eq., 695.

Laches can not be imputed to the Government—a doctrine founded "upon a great public policy." *U. S.* v. *S. C. C. & T. Co.*, 5 McCrary C. C. 572. *Hart* v. *U. S.*, 95 U. S., 316; *Gaussen* v. *U. S.*, 97 U. S. 584.

There can be no innocent purchaser.

Purchases are chargeable with notice of the facts shown by the laws and records, on which the patents were issued. The records in the General Land office show the line of location and the deflection of the road therefrom.

FOURTH PROPOSITION.

The lands in controversy were not subject to grant or indemnity selection because of the New York Indian Reservation created by the treaty of 1838. 7 *Stat.* 550.

These lands were in 1863 and 1866 an Indian Reservation, not subject to the granting acts. *L., L. & G. Co.* v. *U. S.*, 92 U. S. 746.

Letter of the Commissioner of the General Land Office to the Secretary of the Interior, October 31, 1887. Rep. Sec'y Interior, 1887, vol. 1, page 384.

This treaty has never been cancelled.

Senate Miscel. Doc. No. 38, second session Forty-seventh Congress, January 27, 1883. And besides, their removal was not a condition of title, or if so, it was a condition subsequent, which would require a judicial forfeiture, or an express act of Congress. *Schulenberg* v. *Harriman*, 21 Wallace, 63.

And Congress has repeatedly recognized the Indian rights. Act February 19, 1873, 17 Stat., 466; act April 17, 1878, Stat., p. 36.

Butts v. *N. P. R. R.*, 119 U. S., 71; 21 Wall., 309.

The Government recognized the treaty as in force, and in 1868 when the President and the Indians made a treaty for the surrender of the Indian title, but the Senate refused to ratify it.

As these lands were reserved from the grant made by the act of March 3, 1863, because they were an Indian reservation (92 U. S., 746), a subsequent abandonment would not subject the land to the grant, but it would revert to the United States, relieved of any claim by the railroad company: *Southern Pacific R. R. case*, 6 Int. Dept. Land Decisions, 349; *Newhall* v. *Sawyer*, (92 U. S. R., 761); *M., K. & T. R. R. Co.* v. *Noyes*, (25 Kans., 340); *Ryan* v. *Central Pacific R. R. Co.*, (99 U. S., 386); *St. Paul R. R. Co.* v. *Winona R. R. Co.* (112 U. S., 730); *Copp's Land Owner*, vol. 11, pp. 219, 314; *Emerson* v. *Central Pacific R. R. Co.*, vol. 3, Land Decisions Sec. Interior, 117, 166, 227, 490, 305; *K., P. R. R. Co.* v. *Dunmeyer* (113 U. S., 629). See Act Congress April 21, 1876 (18 Stat., 35), and Act June 15, 1880 (21 Stat., 236); *L. L. & G. R. R. Co.* v. *United States* (92 U. S. 741); *A. T. & S. F. R. R.* v. *Rockwood* (25 Kans. 292).

The argument for defendants assumed that the President's proclamation of August 21, 1860, for the sale of the lands covered by the treaty was a sufficient declaration of forfeiture of the rights of the Indians.

The President had no authority to declare a forfeiture. Fort Boisé Hay Reservation case, 6 Int. Dept. Land Decisions 16.

Schulenberg v. *Harriman*, 21 Wall., 62.

The proclamation was never carried into effect.

FIFTH PROPOSITION.

The M., K. and T. Ry. Co. has received more lands than it is lawfully entitled to, exclusive of the lands now in controversy.

This question was not decided in the recent *Brewster case* (118 U. S., 682).

See *Chicago, St. Paul M. and O. Ry. Co. Case*, 6 Land Dec., 215.

If it were necessary to ascertain the facts, a reference could be made to a master to do so.

In *Sioux City R. R.* v. *Chicago Ry.* (117 U. S., 406), in a controversy between two railroad companies, a decision was made settling their respective rights, and the case was remanded to the circuit court in which a master was appointed to determine what lands each should take.

The M. K. & T. Co. is not entitled to indemnity for lands lost in the forty miles of grant for the Kansas Pacific and A. T. & S. F. Companies.

A similar question was decided in the Department of the Interior by Secretary Lamar July 26, 1887—6 Land

Decision 47. (*St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 720.) Copp's Land Owner, Vol. XIV, Sept. 15, 1887, p.139. And see the *Chicago, St. Paul, M. & O. R. R. Case*, Oct. 7, 1887, Copp, Nov. 1, 1887, p. 179; *Sioux City & St. P. R. R. Case*, July 26, 1887, Copp, Nov. 15, 1887, p. 189.

The same result follows in effect from the decision of Secretary McClelland under the act of September 20, 1850–'1, Lester 521, reaffirmed Nov. 23, 1887, by the Interior Department, 6 Land, sec. 348. *Newhall* v. *Sanger* (92 U. S., 762); *L. L. & G. R. R. Co.* v. *U. S.* (92 U. S., 749); *U. S.* v. *Burlington, etc., R. R. Co.* (98 U. S., 339). Attorney-General Devens, June 5, 1880, 16 Opinions, 511; *Winona & St. Peter R. R. Co.* v. *Barney*, 113 U. S., 618, 627; report Secretary of the Interior, 1887, vol. 1, p. 375.

But the other declaration of Justice Davis remains unquestioned, to-wit, that the indemnity clause—

Is still subject to and limited by the proviso which excludes all lands reserved at the date of the grant, and not simply those found to be reserved when the line of the road shall be definitely fixed.

That is, no indemnity is to be given for lands within granted limits which were reserved at the date of the grant. The lands previously granted in aid of the two companies mentioned were expressly reserved from the grant of the act of July 26, 1866.

This was distinctly the view of the Attorney-General, although he held that other language of Justice Davis was *mere dictum*, as stated.

Attorney-General Devens's opinion of June 5, 1880 (16 Op. 513), *M., K. & T. Co.* v. *U. S.*, 97 U. S. 760; *U. S.* v. *Burlington Ry.*, 98 U. S. 334, 337; per FIELD, *Justice*, in *Winona & St. Peter R. R. Co.* v. *Barney*, 113 U. S. 624; s. c., 117 U. S. 228.

This is further shown by the whole purpose and policy of the land-grant system.

(Copp's Land-Owner, July 15, 1886, vol. xiii, No. 8, p. 92; *Rogers* v. *Atlantic & Pacific R. R. Co.* (Copp's Land-Owner, Sept. 15, 1886, vol. xiii, No. 12, 135.)

The lands last patented are the lands, the patents for which are to be canceled.

The act of July 26, 1866, makes a grant in place of "every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate sections per mile on each side of said road, not exceeding in all ten sections per mile." It provides that indemnity lands shall be selected "from the public lands of the United States nearest to the sections above specified."

I. The law presumes that up to the last excessive issue of patents for indemnity selections the Secretary of the Interior approved indemnity selections in proper location—"nearest to the [granted] sections."

The maxim of the law applicable to such presumption is well understood—*omnia præsumuntur rite et soleuniter esse acta donec probetur in contrarium* 12 Wheat, 70.

All having been thus rightly done until the last excessive issue the legal wrong is in that, and hence the last patents are to be canceled.

II. This is the rule (1) of public policy, (2) expediency, and (3) of equity. So long as there was no excessive issue

of patents, purchasers and mortgage creditors of the railroad company had a right to rely on the validity of patents issued. If a purchaser bought lands patented, or if a creditor took a mortgage on lands, up to the time when there was no excessive issue, if the United States should file a bill to cancel some of the patents on the grounds that remote lands had been patented when nearer lands should have been, any court in such case would say the *last* patents shall be canceled.

The court would, up to the point of excessive issue, apply an equitable estoppel, the grantor and grantee both having acquiesced in the patents.

Look at the consequence of a different rule.

SIXTH PROPOSITION.

I.—As to lands on which homestead or pre-emption claims were subsisting at the date of the grant—July 26, 1866—even though subsequently abandoned, no indemnity right attached.

II.—And no indemnity right attached to lands which prior to the date of selection by the Secretary of the Interior had been covered by homestead or pre-emption entries.

The bill alleges that two classes of homestead and pre-emption claimants have equitable rights to some of the even sections in controversy:

I. Those who took the proper steps to secure such right prior to the act of July 26, 1866, and have ever since occupied the lands they claim, and

II. Those who prior to the selection of the lands for indemnity made settlement and tendered compliance with

the homestead and preëmption laws, but were refused, because the Commissioner of the General Land Office had, March 19, April 3, 1867, unlawfully, and in express violation of section 4 of the act of 1866, withdrawn the even sections between the 10 and 20 mile limits from entry [see letter printed record p. 32, 33] and the lands have been patented to the R. R. Co. as indemnity lands.

These claimants have ever since asserted their rights and occupied the lands.

FIRST CLASS.

I. *Those who made settlement prior to the act of July* 26, 1866.

Of these there may be two classes: (1) Those who in all respects complied with the law, and (2) those who on July 26, 1866, had inchoate rights with occupancy but subsequently failed to perfect their claims.

1. Beyond all question those who made settlement prior to July 26, 1866, and complied fully with the law are entitled to be protected.

2. Those whose rights were inchoate with occupancy July 26, 1866, but who subsequently failed to comply with the law are equally entitled to protection.

It is now well settled that land so occupied, was not subject to indemnity selection, and that even the cancellation of the pre-emption claim would not make it subjection to indemnity selection, but it would revert to the *United States*, relieved of any claim by the railroad company: *Newhall* v. *Sawyer*, 92 U. S. R., 761; *M. K. & T. R. R. Co.* v. *Noyes*, 25 Kas., 340; *Ryan* v. *Central Pacific R. R. Co.*, 99 U. S., 386; *St. Paul R. R. Co.* v. *Winona R. R.*

Co., 112 U. S., 730; Copp's Land Owner, vol. 11, pp. 219, 314; *Emerson* v. *Central Pacific R. R. Co.*, vol. 3, Land Decisions Sec. Interior, 177, 166, 227, 490, 305; *K. P. R. R. Co.* v. *Dunmeyer*, 113 U. S. 629. See Act of Congress April 21, 1876, 18 Stat. 35, and Act June 15, 1880, 21 Stat., 236; *L. L. & G. R. R. Co.* v. *U. S.*, 92 U. S. 741; *A. T. & S. F. R. R.* v. *Rockwood*, 25 Kas., 292; *Perkins* v. *C. P. R. R. Co.*, Decisions Int. Dept., 1881–3, p. 357. And in *Union Pacific R. R. Co.* v. *Simmons*, the Secretary of the Interior held, October 4, 1887, that a settlement right defeats the claim to indemnity, "though such [settlement] right was subsequently abandoned without legal assertion." XIV Copp's Land Owner, Dec. 1, 1887, page 203.

It was in view of such cases as this that Congress passed the acts April 21, 1876 (19 Stat., 35), and March 3, 1887 (Stat. 556), in behalf of settlers to waive the failure fully to perfect pre-emption claims, and enable them to secure patents. *Ryan* v. *Central Pacific R. R. Co.*, 99 U. S. 386. [*St. Paul R. R. Co.*, v. *Winona R. R. Co.*, 112 U. S. 730. Copp. L. O., vol. 11, pp. 219, 314; *Emerson* v. *Central Pacific R. R.*, vol. 3, Sec'y Decisions, 117; *Id.* 166; *Id.* 227; *Id.* 490; *Id.* 305; *K. P. R. R. Co.* v. *Dunmeyer*, 113 U. S. 629.]

THE ACT OF CONGRESS OF APRIL 21, 1876, 19 STAT., 35.

Was designed to secure the rights of settlers who had filed declaratory statements under the pre-emption laws or had made entries under the homestead laws prior to notice to the proper local land office of the withdrawal in

favor of any railroad company of lands from such settlement. The settlers here can not *now*, in the General Land Office, have any relief under that act. In the case of *Wisconsin Central R. R. Co.* v. *Stinka*, Secretary Lamar decided, January 25, 1886, that no relief could be granted to a settler while there was an outstanding patent to a railroad company. Vol. 4, Interior Dept., Land Decisions, 344. A similar decision was made June, 1888, as to lands patented to the Wisconsin Central Railroad Company in Ashland County. See 2 Op. Atty. Gen'l, 41; 5 Op., 7; *Streeter* v. *M. K. and T. R. R. Co.*, February 7, 1878, Schurz, Secy. Int. Rep., 1878, part 1, p. 63; Rep. Com. Gen'l Land Office, 1878.

The act of March 3, 1887, Stat. 556.

This act requires the Secretary of the Interior to adjust the land grants for railroad companies. It provides that if it be found that lands have been erroneously certified or patented to or for any company, the Secretary shall demand of the company a release to the United States, whether within granted or indemnity limits, and if such company neglects or fails to reconvey within ninety days, it shall be the duty of the Attorney-General to commence and prosecute suits to recover such lands.

Then section 5 provides, as to lands in the bona fide occupation of adverse claimants prior to 1882, under the pre-emption or homestead laws, and which while so occupied were sold by any railroad company, that the occupants shall be permitted to perfect their proofs and entries, and receive patents therefor.

This act has been construed in case of adjustment of railroad grants 6 Int. Dept. Land Dec. 272; same p. 276.

See *Ard* v. *Pratt*, 43 *Kansas* Rep., 420.

THE SECOND CLASS.

Those settlers who prior to the selection of lands for indemnity made settlement and tendered compliance with the law but were refused because the lands had been withdrawn from market by letter of the Commissioner of the General Land Office by letter March 19, April 3, 1867.

In *Kansas Pacific R. R. Co.* v. *Atchison, Topeka and Santa Fé R. R. Co.*, 112 U. S., 421; *St. Paul R. R. Co.* v. *Winona R. R. Co.*, 112 U. S., 731; *Ryan* v. *R. R. Co.*, 99 U. S., 382; *Grinnell* v. *R. R. Co.*, 103 U. S., 739; *Cedar Rapids R. R. Co.* v. *Herring*, 110 U. S., 27; *K. P. R. R.* v. *Dunmeyer*, 113 U. S., 637; *K. P. R. R.* v. *A., T. & S. F. R. Co.*, 112 U. S., 422; *Cedar Rapids R. R.* v. *Herring*, 110 U. S., 41; *Grinnell* v. *R. R. Co.*, 103 U. S., 742; *Van Wyck* v. *Knevals*, 106 U. S., 360; *Ryan* v. *R. R. Co.*, 99 U. S., 382; see *Burnham* v. *Starkey*, 41 Kansas R., 604.

After the withdrawal of the lands from entry in April, 1867, settlers excused from making proof under the homestead and preëmption laws.

After such illegal withdrawal settlers were not required to tender performance of any act under the homestead or preëmption laws. *Lytle* v. *Arkansas*, 9 How., 333; *Shepley* v. *Cowan*, 91 U. S., 333; *Burnham* v. *Starkey*, Kansas District Court, Allen County, January, 1887, per Stillwell, J.; *Shepley* v. *Cowan*, 91 U. S., 330. See *Van*

Wyck v. *Kneavals*, 106 U. S., 360; *Ry. Co.* v. *Dunmeyer*, 24 Kans., 725, S. C.; 113 U. S., 629.

This rests on the maxim, *Lex non cogit impossibilia. Broom's Legal Max.*, 242; 2 *Parson's Cont.* (6th ed.), 523; *Bowery Nat. Bank* v. *Mayor*, 63 N. Y., 336–340; *Campbell* v. *U. S.*, 107 U. S., 410. See *Cases Collected*, 5 Lawrence's Comptroller Decisions, 24.

Settlers can in this case claim the benefit of the acts of Congress of April 21, 1876 (19 *Stat.* 35) *and March* 3, 1887 (*Stat.* 556).

These acts of Congress recognize the right of these claimants to protection from the courts.

They apply as well to lands within indemnity limits, as to those within granted lands, see *Adjustant Case* 6 Int. Dept. Land Dec. 272, etc.

No demand on the R. R. Co., for a release is necessary to maintain this suit.

I. This suit was commenced before the act of March 3, 1887 was passed. It can not take away the remedy the pending suit. *Dart* v. *Van Kleck*, 7 Johnson, 477; *Bruce* v. *Schuyler*, 4 Gilman, 221; *Hooker* v. *Hooker*, 10 Smedes & Marshall, 599; See authorities cited 1 Curwen's Ohio Stat. 10.

II. And the Attorney-General, in an opinion, November 17, 1887, to the Secretary of the Interior, held that the right to issue patents under the fourth section of said act does not arise until the land shall have been legally determined to belong to the United States. Copp's Land Owner, Dec. 15, 1887, Vol. XIV, p. 214.

III. The remedies provided by the act are cumulative —not exclusive.

It is only when a statute creates a right and provides a special remedy, that the mode it provides becomes exclusive. Bishop Written Law, 163–164; Sedgwick on Stat. (2d ed.) 31; Potter's Dwarris, 74; Maxwell Stat. (2d ed.) 186; Hardcastle Stat. 167–170; *Haycraft* v. *U. S.*, 22 Wall, 81; *State* v. *Marlow*, 15 Ohio St. 114; *Bachman* v. *Lawson*, 109 U. S. 660; *Pugh* v. *U. S.*, 13 Wall, 663.

No adequate remedy except by decree in equity.

I respectfully suggest—

1. In the cases of Starkey and Ard, above cited, the supreme court of Kansas held there is no adequate remedy at law.

2. The remedy at law can not be "complete and adequate" because there is an outstanding patent to the railroad company which is a cloud on the title of the settlers.

3. This claim of an "adequate remedy at law" overlooks the fact (1) that homestead or pre-emption claimants have a claim on the Government to cancel the patents unlawfully issued, and (2) a claim on the Government to issue other patents to them, and (3) it overlooks the fact that if any one settler finally refused to accept, that the United States would have a right to the lands from patents so unlawfully issued.

4. This court has in effect so decided thus in *U. S.* v. *San Jacinto Ins. Co.*, 125 U. S. 273.

When a party to a contract "evinces an intention no longer to be bound by [or perform] the contract," a court of equity will rescind it and restore what has been advanced on the faith of it. Bishop Cont. (2d ed.) 828;

Freeth v. *Burr*, Law Rep., 9 C. P. 208, 213; *Mersey Steel Co.* v. *Naylor*, 9 Q. B. D. 657; *Stephens* v. *Wilkinson*, 2 B. and Ad. 320; *Cox* v. *McLaughlen*, 54 Cal. 605; *Anderson* v. *Haskell*, 45 Iowa, 45; *Reed* v. *Golden*, 26 Kan. 500; *Griswold* v. *Alford*, 31 Miss. 224; *Warren* v. *Richmond*, 53 Ill. 52; *Little* v. *Thurston*, 58 Maine, 86.

A court of equity will reform a contract so as to do justice to the parties. *Ellinger* v. *Crowl*, 17 Md. 361; *Scott* v. *Duncan*, 1 Dev.–Eq. 407; *Rider* v. *Powell*, 4 Abb. Ap. Dec. 63; *Hutchins* v. *Pettingill*, 58 N. H. 386.

The authority of courts to go back of executive action is fully established. *St. Paul* v. *Winona*, 112 U. S. 733; *Steel* v. *Smelting* Co., 106 U. S. 450; *Moore* v. *Robbins*, 96 U. S. 535; *Minter* v. *Cromlin*, 18 Howard, 87; *Polk* v. *Wendell*, 9 Cranch, 99; *Hall* v. *Gaines*, 22 Howard, 144; *Van Wyck* v. *Knevals* 106 U. S. 360; *Dart* v. *Orme*, 41 Georgia, 376; *Fearns* v. *A., T. & S. F.*, 33 Kansas, 280.

Laches can not be imputed to the government. 5 McCreary C. C. 572; *Hart* v. *U. S.*, 95 U. S. 316; *Gaussen* v. *U. S.*, 97 U. S. 584; *Lytle* v. *Arkansas*, 9 How. 333; *Shepley* v. *Cowan*, 91 U. S. 330.

And as to all lands occupied by settlers at the time of any conveyance by the M., K. & T. Co. to any of its grantees, there can be no innocent purchasers.

The occupancy of the lands by the settlers long before the issue of the governor's patent is notice of their claim: *Fearns* v. *A., T. & S. F.*, 33 Kan. 281; *Crews* vs. *Burcham*, 1 Black, 352; *Kelly* v. *Stanberry*, 13 Ohio, 408; *McKenzie* v. *Perrill*, 15 Ohio St. 162; *Hughes* v. *U. S.*, 71 U. S. 281.

APPENDIX.

IN THE DISTRICT COURT OF ALLEN COUNTY, KANSAS.

NELSON BURNHAM
vs.
C. S. STARKEY.

L. W. KEPLINGER, *Att'y for Plaintiff.*
KNIGHT & FOUST, *Att'ys for Defendant.*

OPINION.

This is an action of ejectment brought by the plaintiff against the defendant to recover the possession of eighty acres of land in Allen county, Kansas.

The facts have been agreed to, except paragraphs 5, 6 and 10, of the facts constituting the defendant's defense, and the court has found from the testimony given in the case, the facts to be as found and stated in paragraphs 5, 6 and 10, as hereinafter set out.

The facts agreed to, on behalf of the plaintiff, are as follows:

1st. The land in controversy was patented to the M., K. & T. Railway company in 1873, and the patent is recorded in Book "K" of Deeds, on page 505. Said record is in evidence if either party desires.

2nd. August 30, 1875, plaintiff paid for the lands in full and received a written contract of said date provided to give him right to present possession and to a warranty

deed as soon as the same could be procured; and, on the 13th day of October, 1875, a deed, dated August 30, 1875, to said lands was executed by the said company in all respects regular except that it was signed and acknowledged by the Vice-President instead of the President of said company, which deed is recorded on page 552 of Book "M" and is in evidence if either party so desires.

3rd. On the 12th day of June, 1885, a second deed for said lands was executed by said company for said lands to the plaintiff which recited the execution of the former deed, and recited also that said prior deed had been executed on behalf of the M., K. & T. railway company, by E. Riggs, Vice-President, and also recited that doubts had arisen as to the sufficiency of such execution, proceeded with the following clause:

> Now, therefore, in order to remove such doubts, and to confirm and perfect the title of said Nelson Burnham under said deed, this indenture witnesseth that the said M., K. & T. railway company in consideration of the sum of $11,372.80, the receipt of which is, as in said deed, acknowledged, and, in further consideration of the covenants and conditions therein contained, has remised, released and conveyed unto the said party of the second part, all of its right, title and interest of in and to the following described real estate.

(Here follows description of various lands, including the land in question), which deed is recorded in Book "Three," and is in evidence if either party desires.

The facts on behalf of the defendant, as agreed to and as found by the court, are as follows:

1st. That the defendant, C. S. Starkey, is 66 years of age, and, that he came to the State of Kansas in the month of October, 1866—about the 20th of the month—and located on the land described in the plaintiff's petition,

at that time, and has continuously since then resided on, and occupied the same.

2nd. That at the time he went upon said land it was wild, open and unimproved prairie land, being only one cabin within two miles of it, and at the time more Indians than white people around there.

3rd. That at the time he went upon and occupied said land, he did so with the distinct intention of homesteading the same under the homestead laws of the United States, and that said lands was then government lands of the United States and open to homestead entry.

4th. That, immediately upon going upon said land he commenced improving the same, and within the first year after going upon said land he broke up about fifteen acres of land and planted an orchard of about 100 fruit-trees, built a house and fenced a pasture of about five or six acres and has ever since continued to improve the lands year by year, to this time, using and expending all he has made on said place to the improvement of the same, until now he has broken and cultivated lands of 110 acres, large and commodious buildings, an orchard of seventeen acres, mostly bearing, and the whole under good fence. His improvements being worth from $2,500 to $3,000.

5th. That immediately after settling on this land, to-wit: On October 22, 1866, he went to the government land office at Humboldt, Kansas, (within whose jurisdiction the land was situated) for the purpose of ascertaining from the local land officers if said land was subject to homestead entry, with the *bona fide* intention, if said land was subject to entry, to erect a house on the land, make his permanent residence there, and enter the same the following spring. The defendant communicated his intention to Watson Stewart, who was then and there the duly acting Register of said land office, and attending to the duties thereof, and said Stewart told the defendant, in substance, to build his house on the land and live on it, and

he could enter it. The defendant thereupon went back to the land, and continued to reside on it, and made improvements thereon.

6th. That subsequently, in March, 1867, the defendant went to the said land office again, for the purpose and with the intention of making his homestead entry of the said land, and the then Register of the land office told him that he could not homestead the land, and refused to let him homestead it, assigning, as the only reason for his refusal, that the land had been withdrawn from market for the benefit of the Missouri, Kansas & Texas Railway Company, that it was not homestead land, and that there was no public land in Allen county. He, however, told the defendant to remain on the land, that it would be outside of the railroad land after they had got their quota. The defendant therefore went back to the land, and has remained there ever since, residing on the same, and making permanent and substantial improvements thereon.

7th. That the withdrawal of this land from homestead entry, Commissioner's letter, Mar. 10, 1867, received at the local office at Humboldt April 3, 1867, which is as follows:

8th. That, at the time defendant went upon the lands, and ever since then he was and ever since has been, the head of a family and duly competent and qualified to make a valid homestead entry.

9th. That, at the time the railroad company, through whom the plaintiff claims title, appraised this land, they knew, and were informed by the defendant, that he (the defendant) was homesteading the same and had erected valuable improvements thereon; that, the railroad company's agent and appraiser of the lands, to-wit: Capt. Heard, stopped at the defendant's home while attending to his duties.

10th. Ever since October 20, 1866, the defendant has been in the actual, open, visible and exclusive possession of the land in controversy.

11th. That the land is located in Marmaton township, Allen county, Kansas, being one of the most public cross-roads in South Marmaton township, and the roads passing it being the most traveled ones in the township.

12th. That the defendant's improvements have been assessed to him and he has paid taxes thereon.

CONCLUSIONS OF LAW.

And from the foregoing findings of fact, the Court deduces the following conclusions of law:

1. The rights of the defendant, as a homestead settler, attached to the land in controversy on October 20, 1866, and have never been waived or abandoned.

2. The Action of the Commissioner of the General Land Office, in withdrawing said land from homestead entry by his letter of March 19, 1867, and the action of the local land officers in refusing to allow the defendant to homestead said land, were without warrant of law, and in violation of the rights of the defendant.

3. The land in controversy was included in the patent to the railroad company without warrant of law and in violation of defendant's rights, and conveyed no title as against said defendant.

The plaintiff is not entitled to recover in this action.

The facts briefly may be stated as follows: The land in controversy is a part of the indemnity land granted by act of Congress of date July 26, 1866, (14 U. S. Stat. at Large, page 289) to the Union Pacific Railway, Southern Branch, (since known as the Missouri, Kansas and Texas Railway) to aid in the construction of a railway from Fort Riley, Kansas, to Fort Smith, Arkansas. From recitals in the patent read in evidence, it appears that on August 10, 1872, the land in controversy with other lands was selected by the M., K. & T. Railway Co., as and for indemnity land, to make up for the deficiencies in the

grant in place. A patent for said land was issued by the United States to said M., K. & T. R'y Co. on November 3, 1873, and on August 3, 1875, the plaintiff herein bought said land from the company, and has subsequently received a valid deed therefor.

On the part of the defendant it appears that on October 20, 1866, the land then being public land, and he having all the necessary qualifications to enable him to homestead it, he settled on the land with the *bona fide* intention of homesteading the same; that in March, 1867, he attempted so to do, but was prevented by the local land officers; that he has ever since resided on the land, and has made permanent and valuable improvements thereon, and from all the circumstances in the case it is clearly inferable that he has never abandoned his intention of homesteading the land, provided the land officers of the government will give an opportunity to do so.

Therefore the defendant claims that his rights as an actual settler had attached to the land prior to its selection by the railroad company as indemnity land, that he was illegally denied the right to enter it, that the patent under which plaintiff claims was issued in violation of his rights and without warrant of law, and that as he has never abandoned his homestead claim, his equities are superior to those of the plaintiff, and therefore the plaintiff should not recover in this action.

The first question to be determined, in my judgment, is, What was the legal status of the land when the defendant settled on it on October 20, 1866? It was unquestionably at that time a part of the public domain, and was subject to homestead entry. It was not a part of the grant in place to the railroad company, but was a part of its indemnity lands, and it is now settled by the supreme court of the United States that the right of a railroad company under a land grant act to indemnity lands does not attach to *such* lands until their *selection*.

(Ryan *vs.* Railroad Co., 99 U. S., 382; Kansas Pacific *vs.* A., T. & S. F. R'y Co., 112 U. S., 114; St. Paul & Sioux City R'y Co. *vs.* Winona & St. Peter R'y Co., 112 U. S. 720.)

The rule of law on this question is also very clearly and distinctly stated by our own supreme court in the case of the M., K. & T. R'y *vs.* Noyes, 25 Kan. 340. That case is interesting and important, inasmuch as the controversy there was with reference to a tract of land within the indemnity limits of the same land grant act under which the railroad company obtained the patent to the land in controversy in this action, and in that case, as in this, the defendant claimed that his homestead right had attached to the land prior to its selection by the company as indemnity land.

Mr. Chief Justice Horton, in delivering the opinion of the court, says:

> When the road was definitely located, the right of the company to the odd sections within the ten-mile limit became, *ipso facto*, fixed and absolute. Its title thereto, which was previously imperfect, acquired precision, and became attached to the land. With respect to the indemnity, or 'lieu lands,' as they are called, and which are outside of the ten-mile limit, but within twenty miles of the line of the road, the right was only a float, and attached to no specific tracts until the selection was actually made by the Secretary of the Interior. To the land within the secondary or indemnity territory, from which the deficiency in the ten-mile limit was to be supplied, the railroad company had not and could not have any claims, until specially selected for the purpose of supplying the deficiency.

(L. L. & G. R. R. Co. *vs.* United States, 2 Otto. 741; Ryan *vs.* Railroad Co., 99 U. S. 382; A., T & S. F. R. R. Co. *vs.* Rockwood, 25 Kan., 292.)

> As Noyes made his homestead entry prior to any withdrawal of the land from sale or entry, and before any selection had been made of it to help satisfy a deficiency in the odd sections in the ten-mile limit, and as his homestead was a part of the 'public lands' at such entry, the attempted selection afterward of this tract by the Secretary to supply a deficiency was without authority of the statute. The patent issued to the company was without warrant of law.

(M., K. & T. R'y Co. *vs.* Noyes, *supra*, pages 348–9.)

There is, however, this difference between the case of Noyes and that of the defendant in this action. Noyes had, in contemplation of law, entered his land at the local land office prior to its withdrawal from sale. That is to say, he had filed his declaratory statement, made the preliminary entry payment of $10.00, and paid the office fees. He afterward made his final proof, and otherwise fully complied with the law in all respects. Notwithstanding the Secretary of the Interior, after Noyes had done all these things, cancelled his entry, and the land was subsequently patented to the railroad company.

In the case at bar, the defendant filed no declatory statement, neither did he pay, nor tender any money for the land. Was his failure to do any of these things fatal to his rights, under the circumstances, as shown by the facts agreed to and found to exist? It is an admitted fact that on October 20, 1866, the defendant settled on the land with the intention of homesteading it. On the very next secular day, which was the following Monday, October 22, he went to the land office at Humboldt to ascertain from the local land officers if he could enter the land. He received assurances from the officers to the effect, in substance, that the land was public land, that he could go on and improve it and enter it the following spring. Evidently relying on these assurances, he returned to the land, lived there and improved it, and the next spring, in

March, went to the land office to enter it. Then the land officers positively refused to let him enter the land. They had received the letter from Commissioner Wilson ordering the land withdrawn from market, and they had no discretion in the matter. The defendant could do nothing to change the situation. His testimony is—and it is found to be the fact—that the local officers refused to let him enter the land. The necessary inference is that they refused to let him take a step, or do an act in that direction which would expose them to the censure of having violated or disregarded the orders of their superior. They, however, told the defendant to go back and stay on his land, and assured him, in substance, that eventually it would not be railroad land. The defendant could do nothing more than abide by their orders, and he went back to his premises, and has remained there ever since, making valuable improvements

He did not seek to homestead any public land in any other direction or locality, for the agreed facts admit that ever since October 20, 1866, he has been duly qualified and competent to make a valid homestead entry. He has thus shown, by his entire course of conduct, in the most conclusive manner, that he has never waived or abandoned his homestead claim, but is holding fast to his original intention to obtain the title to these premises from the Government if ever allowed the right and privilege so to do. With reference to the act of Commissioner Wilson, in ordering the withdrawal of these indemnity lands from homestead or pre-emption settlement in advance of their selection by the company, it requires no argument now, in the light of the decisions herein referred to, to demonstrate that his action was utterly without authority of law. The defendant, when he presented himself at the land office at Humboldt, in March, 1867, and demanded permission to enter the land, had the legal right to do so; nor can it be successfully maintained that his rights could

be prejudiced by the erroneous action of the local land officers. The Supreme Court of the United States has decided that,

> where a party has settled upon public land with a view to acquire a right of pre-emption, the land being open for settlement, his right thus initiated is not prejudiced by a refusal of the local land officers to receive his proofs of settlement, upon an erroneous opinion that the land is reserved from sale. (Shépley et al., *vs.* Cowan et al., 91 U. S., 330.)

And if it were allowed to go outside of the agreed facts in this case, and take judicial notice of a part of the current judicial history of the land grant involved in this action, I might observe, as a fact which ought to strengthen the equities of the defendant in this case, that the M., K. & T. R'y company never filed the map of the definite location of its road with the Secretary of the Interior until December 6, 1866. (A., T. & S. F. R'y Co. *vs.* Rockwood, 25 Kan., 295; M., K. & T. R'y Co. *vs.* Noyes, *id*, 344.) Therefore, as against parties whose homestead or pre-emption rights had attached to any of said lands, prior to the filing of said map on December 6, 1866, the railroad company acquired no rights to such lands, but took its grant, even as to the lands in place within the first ten-mile limit, subject to all valid pre-emption and homestead claims which had their inception prior to said December 6, 1866.

(Van Wyck *vs.* Knevals, 106 U. S., 360; K. P. R'y Co. *vs.* Dunmyer, 24 Kan., 725; same case affirmed on appeal by the United States supreme court, 113 U. S., 629.)

Therefore, when the defendant settled on the land in controversy, on October 20, 1866, and before filing by the company of the map of the definite location of its road, every acre of the land intended to be granted by the act of July 26, 1866, was, as to said defendant, public land and subject to pre-emption or homestead settlement.

This is a matter, however, which is probably immaterial in this case. As Chief Justice Horton has shown in the Noyes case, *supra*, the filing of the map of the definite location of the road was necessary to fix its right to the odd sections within the ten-mile limit, and that was all the result that followed from the filing of said map.

We are concerned in this case with a tract of indemnity land, and the right of the company to such land attached from its selection only; and the company never selected this land until some years after the homestead rights of the defendant had attached thereto. Its power to select this land then, and take it away from the defendant, and deprive him of his vested rights, did not exist.

My conclusion, therefore, is that the homestead rights of the defendant attached to the land in controversy in October, 1866, that he followed up this initiatory right with due promptness when he sought to enter it the following March, that the refusal of the local land officers to allow him to enter, based on an illegal order of the Commissioner of the General Land Office, should not and cannot be allowed to prejudice him, that he has done nothing in the meantime to forfeit or waive his rights, but on the contrary, has remained in the continual and constant assertion of them. I hold, therefore, that the land in controversy was improvidently and wrongfully included in the patent issued to the railroad company, and conveyed no title, as against this defendant.

As the defendant was in the actual, open, visible and exclusive possession of the land at the time of plaintiff's purchase from the railroad company, it follows that plaintiff bought with notice of defendant's equities, and is chargeable therewith. (Tucker *vs.* Vandemark, 21 Kan., 263.) He is in no position, therefore, to claim the protection which the law, under certain circumstances, gives innocent purchasers.

In order to guard against any possible misunderstanding, it may not be out of place for me to say that there is

nothing whatever in the decision of this case that in the slightest degree conflicts with the case of the K. C., L. & S. K. R. R. Co. *vs.* Brewster, (4 *Kansas Law Journal*, p. 265), recently decided by the U. S. supreme court, involving the validity of the title to certain lands in this county. That was a case wherein the United States, by and through its Attorney General, went before the courts, challenging and attacking the action of some of its own officers in certifying lands to the State of Kansas, and seeking to have the acts of said officers in that regard set aside and held for naught. No question of mere private or personal rights, as regards prior equities of actual settlers, arose in that case, and the supreme court, in its decision, simply held in substance that the commissioner of the general land office in certifying the lands in controversy in that case to the State of Kansas violated no law, but on the contrary acted in accordance with the law, and therefore the United States had no good or sufficient cause to have his proceedings set aside.

In this action, a private individual is defending his possession of a piece of land against a party claiming under a patent from the government on the ground and for the reason that owing to the facts of his particular case his land was wrongfully, as to him, included in the patent.

Judgment will be rendered for the defendant, that he recover his costs of the plaintiff and go hence without day.

L. STILLWELL,
Judge.

JANUARY, 1887.

Office Supreme Court U. S.
FILED,
MAR 2 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES,
APPELLANT,
vs.
THE MISSOURI, KANSAS, AND TEXAS RY. CO. ET AL.

No. 733.

Appeal from the United States Circuit Court for the District of Kansas.

BRIEF FOR APPELLEES.

A. T. BRITTON,
A. B. BROWNE,
Atty's for Appellees.
SIMON STERNE,
of Counsel for M., K. & T. Ry. Co.
JAMES HAGERMAN,
of Counsel for Receivers.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1891.

Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,

v.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY ET AL.

No. 733.

Appeal from the Circuit Court of the United States for the District of Kansas.

Brief for Appellees.

STATEMENT.

This is a bill in equity filed by the United States to vacate certain patents issued to the Missouri, Kansas & Texas Railway Company for some 40,000 acres of *even*-numbered sections of land, situate in Allen County, Kansas, and within the indemnity limits of the Company's land grant. More than two hundred individuals, firms, corporations, and estates are made defendants as purchasers or mortgagees, in near and remote degree, under the railroad patent title. The average holding of such defendants is less than 200 acres each.

Of the lands involved, some 36,000 acres were so patented to this Company on November 3, 1873; 2,500 acres on March 19, 1875; 400 acres on August 17, 1876, and 680 acres on April 23, 1877.

This bill was filed December 8, 1887.

Demurrer was filed by all these numerous defendants. After full argument, the Circuit Court sustained such demurrer and dismissed the bill. (Rec. 36–39.)

The grounds on which the United States seeks by this bill to vacate the patents here in question are almost wholly *res adjudicata* in this Court. They were set up by the Government in the case of the Attorney-General *v.* The Kansas City, Lawrence and Southern Kansas Railroad Company (the grantee of this defendant Company), the Mo., Kans. and Texas Co. intervening, wherein this Court by unanimous opinion dismissed the Government's bill at the October term, 1886 (118 U. S. p. 682). That case involved the indemnity odd-numbered sections conveyed to the Missouri, Kansas and Texas Railway Company in Allen County. Whilst the scope and effect of that decision will be hereafter fully stated, it should here be remarked that the United States in that suit had full opportunity to raise, argue, and have fully determined all questions affecting this Company's title to its land grant in said County, and that the questions which were so raised, argued, and decided in that case are, we respectfully submit, sufficient to justly control the conclusion of the Court in this case. Indeed, such was the view of Mr. Justice Brewer in rendering opinion and decree in *this* case upon the Circuit, where, after most elaborate argument attacking the conclusions expressed by this Court in the former case, the then Circuit Judge did not hesitate to follow same, and to render decree dismissing the Government's bill.

As preliminary to a statement of the several grounds on

which the Bill now presented seeks to vacate this long outstanding title, it is proper to briefly present the historical, legislative, and executive record on which the titles in question are founded.

History of the M., K. & T. Grant.

By act of March 3, 1863 (12 Stats. 772), Congress granted lands to the State of Kansas for the purpose of aiding in the construction—

First. Of a railroad from Leavenworth *via* Lawrence to the southern line of the State, in the direction of Galveston Bay, in Texas, with a branch from Lawrence by the valley of the Wakarusa river to the point on the Atchison, Topeka & Santa Fé Railroad where said road intersects the Neosho river (which point is the city of Emporia).

Second. From Atchison *via* Topeka to the western boundary of the State, "*with a branch from where this last-named "road crosses the Neosho, down said Neosho valley to the "point where the first-named road enters the said Neosho "valley.*"

The State accepted these grants by act of February 9, 1864. By the same act the State conferred the grant made for the first-named road upon the Leavenworth, Lawrence & Fort Gibson Railroad Company, and for the second road and branch upon the Atchison, Topeka & Santa Fé Railroad Company. The State act conferring the grants upon the latter road added thereto the promise, that if Congress should, before March 4, 1866, extend the grant for the Neosho Valley Road northward to an intersection with the Union Pacific Railroad, Eastern Division, at or near Fort Riley, the Atchison Company should be entitled to earn same on the same terms and conditions therein prescribed.

July 1, 1864 (13 Stats. p. 339), Congress did extend the

grant of 1863 to the State to aid the construction of a railroad "from Emporia *via* Council Grove to a point near "Fort Riley, on the branch Union Pacific Railroad in said State."

This legislation made operative the State's promise to confer upon the Atchison Company this extension of the Neosho Valley grant.

Thereafter (March 19, 1866), the Atchison Company assigned to the Union Pacific Company, Southern Branch (now the Mo., Kans. and Texas R'y Co., this defendant), the right to receive, hold, and enjoy this land grant; the latter named Company having theretofore been incorporated under the law of the State for the purpose of constructing a road from a junction with the Union Pacific Railway, Eastern Division, at or near Fort Riley, to the southern boundary of the State.

With full knowledge of such assignment and in direct recognition thereof, Congress, by act of July 26, 1866 (14 Stats. p. 289), enlarged and consolidated the grants of 1863 and 1864, by making an amendatory or supplemental grant over the same line to the State, but for the direct use and benefit of this assignee Company. Such act declares:

"That for the purpose of aiding the Union Pacific Rail-
"road Company, Southern Branch, the same being a cor-
"poration organized under the laws of the State of Kansas,
"to construct and operate a railroad from Fort Riley, Kan-
"sas, or near said military reservation, thence down the
"valley of the Neosho river, to the southern line of the
"State of Kansas, with a view to an extension of the same
"through a portion of the Indian Territory to Fort Smith,
"Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said Railroad Company," lands in specified quantity, with rights of indemnity, etc.

Shortly after the assignment stated, and on the passage

of the Federal act of 1866, the State Legislature passed an act on Feby. 26, 1867, which "ratified and confirmed such assignment."

The foregoing statements are substantially set forth in the present bill, and appear at large in the decision of the former case (118 U. S. 682).

February 19, 1867, the Union Pacific Railroad, Southern Branch, filed with the Secretary of the Interior map showing the definite location of its line of road from its northern terminus (Fort Riley) to the southern boundary of Allen County, which map, as the bill avers, "was then accepted "by said Secretary of the Interior" (Bill, Par. IV, Rec. 4).

Thereupon on March 19, 1867, by letter from the Commissioner of the General Land Office to the Register and Receiver at Humboldt, Kansas, the lands embraced in the grant were directed to be withdrawn (Rec. 32). Said letter transmitted a diagram "with the 10 and 20-mile limits "on each side of the road laid down thereon," and instructed the local officers as follows:

"You will upon its receipt proceed to mark on your "plats the limits as thereon designated, and will reserve "from sale, location, or entry of any kind, except in case of "*bona fide* pre-emptions initiated prior to withdrawal, all the "odd-numbered sections within the ten-mile limits, *and all* "*the vacant lands between the ten and twenty-mile limits.*"

The lands here in suit are within such indemnity limits. By the grant of 1866 there was given every alternate section of land designated by odd numbers to the extent of five alternate sections per mile on each side of said road. And if upon definite location it appeared that any of such sections had been sold, reserved, or otherwise appropriated, or that the right of pre-emption or homestead settlement had attached thereto—

" Then it shall be the duty of the Secretary of the In-
" terior to cause to be selected for the purposes aforesaid,
" *from the public lands of the United States nearest to the*
" *sections above specified*, so much land as shall be equal to
" the amount of such lands as the United States have sold,
" reserved, or otherwise appropriated, or to which the right
" of homestead settlement or pre-emption has attached as
" aforesaid, which lands *thus indicated by the Secretary of*
" *the Interior shall be reserved and held for the State of*
" *Kansas for the use of said Company, by the said Secre-*
" *tary, for the purpose of the construction and operation of*
" *said railroad, as provided by this act.* * * * *And,*
" *provided further*, That said lands hereby granted shall not
" be selected beyond twenty miles from the line of said road."

By section 3 of the act of 1866, said road was required to be fully constructed within ten years from the date of the Company's acceptance of the grant. The grant was so accepted by the Company, and the entire road was completed on July 9, 1870 (Bill, Par. IV, Rec. 15), and each patent conveying the lands here in suit contains the following recital:

" And, whereas, it is indicated by letter of the Secretary
" of the Interior to the Commissioner of the General Land
" Office, dated July 25, 1870, and map therewith duly cer-
" tified by the Governor of the State of Kansas that the
" said 'Missouri, Kansas and Texas Railway Company' has
" fully equipped and completed, as required by the act, the
" said railroad from Junction City to the southern bound-
" day of the State of Kansas." (Rec. 21, 26, 28, and 30.)

The patent dated November 3, 1873, which conveyed the greater bulk of the land in suit, also recites (Rec. 21) that said Company selected the land therein embraced on August 10, 1872. The patent issued March 19, 1875, contains like recital of selection of the land therein embraced on July 29, 1874 (Rec. 26). The patent issued August 17, 1876, con-

tains like recital of the said Company's selection of the lands therein embraced on May 10, 1876 (Rec. 28); and the patent issued April 23, 1877, contains like recital of the Company's selection of the lands therein embraced on July 12, Nov. 7, and Dec. 6, 1876 (Rec. 30).

In the former case before this Court the United States sought to vacate the Company's titles to the *odd*-numbered sections of the indemnity lands in Allen County, and in support thereof contended in substance:

1*st*. That by the grants of March 3, 1863, and July 1, 1864, and which were conferred by the State upon the Atchison Company upon the one part, and the grant of July 26, 1866, to the State for the direct use and benefit of this defendant Company upon the other part, two lines of Land-grant Road down the Neosho Valley from Fort Riley were contemplated.

2*d*. That the assignment by the Atchison Company of its rights under the grants of 1863 and 1864 to the M., K. & T. Co., and the subsequent ratification thereof by the State of Kansas, was null and void. And hence the claim of the M., K. and T. Co. under those acts and its constant recognition by the Federal Land Department was erroneous.

3*d*. Assuming the construction of two roads was required to earn the grants made by the acts of 1863 and 1864, conferred through the State upon the Atchison Company, and under the act of 1866, by the M., K. & T. Co., the Government contended that the latter Company could claim no lands, rights, or privileges under the acts of 1863 and 1864. And as those acts appropriate all the lands between the termini named, and no road had been constructed thereunder, the M., K. & T. Co. practically took nothing by its construction under the act of 1866, because the lands covered by the earlier grants of 1863 and 1864 were excepted from the latter grant of 1866 for that Company.

4th. That the road of the M., K. & T. Co. was not constructed to the point in the Neosho Valley where the Leavenworth, Lawrence and Fort Gibson Railroad enters said valley as contemplated by the act of 1863, but made junction therewith at a point some eight or ten miles below that contemplated by said act.

5th. That the M., K. & T. Co. had received an excess of lands beyond that to which it was entitled under its grant.

6th. That all the lands involved in said suit were embraced within the New York Indian Reservation by treaty made under date of January 15, 1838, which had never been revoked, and were thereby reserved and excepted from each and all of these railroad grants.

These several propositions were elaborately argued before this Court both orally and in print. The decision (rendered by Mr. Justice Miller) thereon recites at length the salient facts above set forth, and holds:

1st. That by the legislation of Congress, the action of the State, and the like action of her grantees, the grants of 1863, 1864, and 1866 were merged in the Missouri, Kansas and Texas Co., for the construction of ONE road from Fort Riley down the Neosho Valley to the southern boundary of the State. That the acts making the grant "are to be taken " and construed *in pari materia*, and that the only object " was the building of one road" (118 U. S. p. 690).

2d. That the assignment by the Atchison Company to the M., K. & T. Co. of its rights under the grants of 1863 and 1864, and the ratification thereof by the State Legislature, were valid acts, and thereby the latter Company had, before the passage of the grant of 1866, "become possessed of all " the rights existing under the acts of 1863 and 1864, with " regard to building a railroad down the Neosho Valley " (p. 689.)

3rd. That the point of intersection in the Neosho Valley

made between the road of the M., K. & T. Co. and the road of the L., L. & G. Co. was fully within the provisions of the original grant of 1863 (p. 693).

4th. That neither upon the pleadings nor the evidence could it be determined that the lands received by the M., K. & T. Co. were in excess of the various grants made to it: that the issue was not fairly made by the bill, and no identification of the particular lands constituting such excess was presented (p. 695.)

5th. All other grounds of relief urged by the Government as above stated were summarily disposed of in the concluding sentence of the decision, thus (p. 695):

"There are other grounds urged for granting the relief "sought by the bill, but they are not sufficient to justify "such a decree, nor are they important enough to require "further discussion here."

Whilst the lands involved in the decided case embrace the *odd*-numbered sections within this Company's indemnity limits in Allen County, and the lands involved in this case are the *even*-numbered sections in the same limits and the same County, it is worthy of remark that when the original suit against the odd-numbered sections titles was brought, the United States had *then* full opportunity to ask the same relief against the even section titles and to pray for the cancellation of these patents. No new facts are presented by the present bill; no assertion of recently-discovered fraud is made, and no justification appears for this dual attack upon this Company's titles. Both the Company and its numerous grantees are thus assailed upon allegations of fact at all times within the knowledge of the Government, and this renewed attack upon these titles ought on such ground alone to be dismissed. We fail to discover any principle of law justifying the Government's piece-meal attack upon these

titles when it has enjoyed at all times unbounded opportunity therefor, and when in equity and good conscience it should have embraced the even-section portions of these patents in its original case, or failing so to do, ought thereafter to have remained silent.

But the pleader who framed the present bill seems by some strange oversight to have been wholly unfamiliar with the fact of the original suit, of the argument and grounds on which the Government's demand for cancellation was there rested, and of the decision of this Court thereon. For, in apparent contempt of that decision, the present bill avers:

1*st*. That the assignment by the Atchison Company to the M., K. & T. Co., and the ratification thereof by the State of Kansas, was null and void. (Bill, Pars. V and VIII, Rec. 5, 6, 7, 8.)

2*d*. That the road of the M., K. & T. Co. was constructed on an average of two miles from the line marked on its map of definite location, and hence the grants were not earned. (Bill, Par. 6, Rec. 6.)

3*d*. That the order of withdrawal *supra* for the M., K. & T. Co., on March 19, 1867, was unauthorized and in violation of law. (Bill, Par. 9, Rec. 10 and 11.)

4*th*. That the defendant Company has received a large excess of lands, which is sought to be demonstrated by long and elaborate recital. (Bill, Par. 10, Rec. 10, 11, 12, and 13.)

5*th*. That the lands here in question were embraced within the New York Indian Reservation "ceded to said "Indian Nation or tribe by the treaty of Jan. 15, 1838, which "reservation has never been extinguished by any law or "treaty, or judicially forfeited, or in any other manner "whatsoever abrogated or set aside." (Bill, Par. XI, Rec. 13.)

And the sole *new* ground on which this Company's title to the even-numbered indemnity sections patented for its benefit, as above recited, is now attacked is found in paragraph 7 of the bill (Rec. 7).

In substance, the contention there made is that by the original grant of 1863 for the road first named therein, from Lawrence *via* Leavenworth to the southern boundary of the State, the *even*-numbered sections within the primary limits of ten miles were raised "to double the minimum "price and designated as sections and parts of sections of "land which shall remain in the United States." That the odd sections within both the place and indemnity limits were withdrawn for the benefit of that Company, and hence the even-numbered sections within such limits were not subject to be taken under the later grant of 1866 to this Company as indemnity lands, and as the lands here in suit fall within such limits, the patents were wrongfully issued to this Company, and on that ground should be cancelled.

This presents the only pertinent question which, in our view of the case, is not wholly covered by the express adjudication of this Court in the former case. But out of abundant caution we shall, with all possible brevity, present the argument upon each ground presented by the bill, and in the order above stated.

ARGUMENT.

In presenting argument herein we shall freely cite from the record in the original case (118 U. S.) because the present bill does not disclose the facts of public record which make the history of this land grant. Whilst standing on demurrer, such citation is proper—

1st. Because part of the records of this Court in a cause involving the same parties and subject-matter;

2d. Because the documents referred to are *public records* of the Government of which the Court may take judicial notice; and

3d. They are necessary to an intelligent understanding of the bill.

I.

Alleged Invalidity of the Assignment.

A.

The bill in the former case, as shown by the record thereof (p. 4), asserts:

"Nor did any part of said land pass to said Missouri, "Kansas & Texas Railway by virtue of said assignment "and said resolution of the Legislature of the State of "Kansas."

The brief of the Attorney-General in that case (p. 5) asserts—

"That this assignment was void and conferred no rights "upon the Missouri, Kansas & Texas Railroad Co under "the acts aforesaid will not be seriously denied."

The "brief and argument for the United States" filed by Mr. William Lawrence therein, by authority of the Attorney-General, devotes some fifty pages to an attack upon this assignment and the Legislature's ratification thereof. It is impossible to here review the argument there made, and which was elaborately pressed at the bar. It is sufficient to say that every conceivable ground of objection was pressed with great energy and fullness. Yet this Court, without dissent, affirmed the validity and force of such assignment and the State Legislature's ratification thereof.

That such conclusion was correct is beyond question. That it is *res adjudicata* here is certain.

The grants of 1863 and 1864 in terms provided—

"That the said lands hereby granted to said State shall "be subject to the disposal of the LEGISLATURE thereof, for "the purposes aforesaid and no other."

(Act of March 3, 1863, sec. 3, 12 Stats. 772; July 1, 1864, 13 Stats. 339.)

By joint resolution the Legislature approved this assignment and transfer. Such resolution aptly expressed the will of the two Houses constituting the Legislature. The lands granted have been devoted to the purpose of constructing the railroad from Fort Riley down the Neosho Valley. There was neither lack of power in the Legislature to permit such transfer, nor any subsequent diversion of the grant from the purpose originally intended.

The objection urged by the present bill (Rec. 6) is solely that such ratification by *joint resolution* was inoperative, and "could only be had by an *act* of said Legislature regularly "passed and enacted."

Yet *that* ground is fully stated in Mr. Lawrence's brief in the former case, and numerous authorities cited in its alleged support. (Brief, pp. 76, 77, 78.)

Copy of such joint resolution is found in the record of the former case (Rec. p. 50) bearing approval of the Governor. Hence there was distinct concurrence of State, Legislative, and Executive approval.

The bill in present case (Rec. 6) avers that on filing map of definite location with the Secretary of Interior by the M., K. & T. Co. there was filed therewith statement by said Company formally asserting claim to *all* the grants made by the Federal acts of 1863, 1864, and 1866. The

pleader should have added, what is shown by the record of the former case (p. 65), that by decision of Mr. Secretary Browning thereon of March 25, 1867, it was held:

"In virtue of said assignment and the ratification thereof "by the Legislature of the State of Kansas, the lands enur- "ing to the State under said grants of 1863 and 1864 will "be adjusted to the State for the benefit of said Union "Pacific Railway (Southern Branch) Company upon the "principles heretofore established and now in force, and "then if any lands remain to the United States of odd sec- "tions within the limits of twenty miles on each side of the "railroad between the termini mentioned, the said Union "Pacific Railway (Southern Branch) Company will become "entitled to patents for such odd sections, and also for such "even sections as remain to the United States outside the "ten and within twenty miles of the road, upon complying "with all the terms, conditions, and stipulations of said act "of July 26, 1866.

"If the even sections of land remaining to the United "States outside of the ten and within the twenty miles have "not been withdrawn, you will issue the necessary instruc- "tions to the land officers in Kansas withdrawing the same."

Thereunder the road was fully constructed over twenty years ago, the lands conveyed accordingly years since, and on such basis the grant has within the past few months been finally adjusted by the present Secretary, pursuant to statutory direction, as will be hereafter fully shown.

II.

Alleged Deflection in Construction.

A.

On this point the bill is contradictory and misleading. By paragraph IV (Rec. 4) it is averred that the line of con-

structed road deflects from the line of definite location "an "average distance of nearly two miles," and as "correctly "shown on the map, marked Exhibit A," attached to and made part of the bill.

By paragraph VI (Rec. 6) the implied averment is that between the termini of the grant—Fort Riley or Junction City on the north and the southern boundary line of Kansas on the south (a distance of 189 miles)—this average deflection of two miles between located and constructed line obtains.

But inspection of the diagram, Exhibit A, *supra* (Rec. 14–15), discloses such deflection on a short *portion* of the line only and extending only *some ten miles or less* in length. The variance is trifling and wholly immaterial. The lands here in suit are far within the prescribed lateral limits of the grant, whether measured from one line or the other. In fact, this slight deflection brings the lands in suit *nearer* the road as constructed.

B.

Answering a similar contention, this Court in *Van Wyck* v. *Knevals* (106 U. S. 360) said:

"As to the alleged deviation of the road constructed from "the route laid down in the map, admitting such to be the "fact, the defendant is in no position to complain of it; *the* "*lands in controversy are within the required limit*, "*whether that be measured from one line or the other.* A "deviation of the route without the consent of Congress, *so* "*as to take the road beyond the lands granted*, might, per- "haps, raise the question whether the grant was not aban- "doned, but no such question is here presented. The de "viation within the limits of the granted lands in no way "infringed upon any rights of the defendant."

C.

The grants of 1863 (Sec. 4) and 1866 (Sec. 3) make the

certificate of the Governor of the State, as to the *fact* of construction, the mode of proof required. But the act of 1863 adds thereto the requirement that the Secretary of the Interior "shall be satisfied that said State has complied, in "good faith, with this requirement."

In the record of the former case (p. 52) appears the following certificate of construction:

EXECUTIVE OFFICE,
TOPEKA, KANSAS, *July* 13, 1870.

I, James M. Harvey, Governor of the State of Kansas, do hereby certify that this map and profile of the Union Pacific Railway Company, Southern Branch, now known as the Missouri, Kansas and Texas Railway Co., has been filed in my office by the said railway company, and shows that portion of the said railroad, commencing at Junction City, at or near the centre of section 12, town. 12 south, range 5 east, and ending — southern line of the State of Kansas at *a* — thousand five hundred and ten (3,510) feet east of the 27th mile-post, and one thousand seven hundred and eighty-four (1,784) feet west of the twenty-sixth (26th) mile-post on said southern line of the State of Kansas, *which has been completed and equipped as required by the acts of Congress granting lands to the State and to the said railroad company*, approved March 3d, 1863, July 1st, 1864, and July 26th, 1866, and the act of the legislative assembly of the State of Kansas, approved February 9th, 1864, entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to construction of such roads and telegraphs."

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State.

Done at Topeka this thirteenth day of July, 1870.

[SEAL.] JAMES M. HARVEY,
Governor.

Attest:
THOMAS MOONLIGHT,
Secretary of State.

Accompanying said map and certificate was the following affidavit (Rec. 51):

STATE OF KANSAS, }
County of Davis, } *ss:*

O. B. Gunn, of Junction City, in said County and State, being duly sworn, deposeth and says, that he is Chief Engineer of the Union Pacific Railroad Company, Southern Branch, now known as the Missouri, Kansas and Texas Railway Co., and has been such Engineer since Nov. 1, 1869; that the line on this map, commencing at Junction City, at or near the centre of section twelve (12), in township twelve (12) south, of range five (5) east, and terminating at the southern line of the State of Kansas, at a point three thousand five hundred and ten (3,510) feet east of the twenty-seventh (27th) mile-post or mound, and one thousand seven hundred and eighty-four (1,784) feet west of the twenty-sixth (26th) mile-post or mound on said southern line of the State of Kansas, shows the line of the route of said road in connection with the lines of the public surveys; that the road between those points has been completed and equipped as required by law.

O. B. GUNN,
Chief Engineer.

Sworn and subscribed this 9th day of July, 1870, before me—

[SEAL.] THOMAS HOOKEY,
Notary Public.

This map of constructed road, showing (as recited by Chief Engineer Gunn) "*the line of the route of said road* "in connection *with the lines of the public surveys*," and the Governor's certificate of construction and equipment as required by the Federal and State acts, were filed with the Secretary of the Interior. By the act of 1863, *supra*, the certificate of construction was operative only if "*the said* "*Secretary shall be satisfied that said State has complied* "*in good faith with this requirement*" (*i. e.*, construction).

The map of constructed road so filed showed the line thereof "in connection with the lines of the public surveys." The map of definite location had long before been similarly adjusted and diagrams showing the limits of the grant had been made therefrom, and on same the lands granted had been withdrawn. Hence there was *then* perfect opportunity for comparison to establish identity of located and constructed line. No fact exists to-day with respect thereto that was not *then* fully known. No facts were concealed on our part, and no possible room exists for charge of fraud.

On July 25, 1870, the Secretary *accepted* this proof of construction and transmitted same to the General Land Office. And as recited, *supra*, each patent here in suit contains the following recital:

"And whereas it is indicated by letter of the Secretary "of the Interior to the Commissioner of the General Land "Office, dated July 25, 1870, and map therewith, duly cer- "tified by the Governor of the State of Kansas, that the "said 'Missouri, Kansas and Texas Railway Company' *has* "*fully completed and equipped, as required by the act, the* "*said railroad from Junction City to the southern boundary* "*of the State of Kansas.*"

D.

Further. The grant of 1863 (sec. 3) prescribed the condition that the road should be and remain a public highway for the transportation of Government property and troops "free from all toll or other charge."

The grant of 1866 (sec. 3) added thereto thus:

"That the grant of lands hereby made is upon condition "that said Company, after the construction of its road, shall "keep it in repair and use, and shall at all times transport "troops, munitions of war, supplies, and public stores upon "its road for the Government of the United States, free

" from all cost or charge therefor to the Government, when " required to do so by any Department thereof."

And each grant imposes the further condition:

" That the United States mail shall be transported on said " road and under the direction of the Post-Office Depart- " ment, at such price as Congress may by law provide."

From the time of construction of this road down to the present, it is a matter of public record that the United States *has* enjoyed free transportation *over the whole thereof*, as a land-grant road, in carriage of their property and troops, at large saving of cost. And the mails have similarly been carried at the largely-reduced rates applied to land-grant roads by the acts of July 12, 1876, sec. 1 (19 Stats. 79), and June 17, 1878, sec. 1 (20 Stats. 142).

In the face of all these facts how puerile is the suggestion of the bill (par. IV, p. 5) that this Company has failed to construct its road and refused to transport the mails, troops, and property of the United States "*on said line of location*," and hence is not entitled to hold its lands. And of what possible force is the further contention that the road was fraudulently located to secure more and better lands? The measure of grant was the same, the lands here in suit were included therein, measured from either line. The length of road was the same. Hence there could be no *increase* of the land grant nor change of its *locus* affecting the Government. The slight divergence is common to every constructing road in a new country when local conditions compel such immaterial deflections.

Such pleading is unworthy of a great Government. Against it we place the sound utterance of this Court in *Van Wyck* v. *Knevals*, *supra*, as follows:

" The defendant having failed to establish the validity of

" his own title, attacks the right of the Company to the lands " covered by the grant, alleging that the Company never com- " pleted the construction of the entire road for which the " grant was made; that after filing its map with the Secretary " of the Interior it changed, for part of the distance, the route " of the road, and that it never complied with the condi- " tions of the laws of Nebraska for the extension of its " road within the limits of that State.

" We do not deem these objections, when considered with " the facts on which they are based, as having any force. " There is to them a ready and conclusive answer. Assum- " ing that the Burlington and Missouri River Railroad, with " which the Company's road connected, was not, as averred " by the complainant, a branch of the Union Pacific Rail- " road, and that therefore the Company's proposed road was " not entirely completed, the fact remains that the Company " constructed a portion of the proposed road, and that por- " tion was accepted as completed in the manner required by " the act of Congress. Patents for some of the adjoin- " ing sections were accordingly issued to the Company, and " a right to all of them, not specially reserved by the con- " dition of the grant, vested in it. So far as that portion " of the road which was completed and accepted is con- " cerned, the contract of the Company was executed, and " as to the lands patented, the transaction on the part of the " Government was closed and the title of the Company per- " fected. The right of the Company to the remaining odd- " numbered sections adjoining the road completed and " accepted, not reserved, is equally clear."

E.

The facts of public record connected with the construction of this road and executive acceptance thereof apply hereto the principle announced in Van Wyck *v.* Knevals, *supra*, with conclusive force.

By the treaties of 1866, with the five civilized Nations in the Indian Territory, *one* railroad north and south and *one* railroad east and west, through their several domains, was provided for.

Early in 1870 the Union Pacific R.R., Southern Branch (now the Mo., Kans. & Texas Co.), the Leavenworth, Lawrence & Fort Gibson R.R. Co., and the Kansas & Neosho Valley Ry. Co. appeared before Mr. Secretary Cox, each claiming the right to construct this ONE road north and south across that Territory. The Cherokees and Creeks also appeared, and lengthy hearings by counsel were indulged.

May 21, 1870, Mr. Secretary Cox submitted a lengthy opinion to the President, concluding, after recital of the laws and treaties—

1*st*. That but *one* road was authorized to so build; and

2*d*. That a Commission consisting of one officer of the Indian Service and one military officer, each in official command in that region, be appointed to determine which of said roads should first reach the proper point on the Indian Territory boundary, and thus earn the right of construction across the same.

May 23, 1870, President Grant approved these recommendations.

June 13, 1870, such Commission reported to the Secretary that the Mo., Kans. & Texas constructed road reached the Indian Territory boundary line at noon on June 6, 1870; that at that time there was no other railroad nearer than 16 miles from that point; and that on June 9, 1870, the Governor of Kansas had certified complete construction thereof.

Then followed most vigorous attack before the Secretary upon this Company's construction by rival roads. Every adverse contention or suggestion was made. But by communication of July 12, 1870, to the President, Mr. Secretary Cox recommended acceptance of the road and recognition of this Company's right thereon to construct the ONE north and south road through the Indian Territory.

July 20, 1870, President Grant endorsed this report thus:

" Approved, and the recommendations of the Secretary " of the Interior will be carried into execution."

It is submitted that the Governor's certificate of construction, provided by statute, and the circumstances attending *acceptance* thereof by the President, close all discussion twenty years later on this alleged deflection. Constant *use* of the road, with its attendant land-grant benefit in transportation, recital of proper construction by the Government's patent under seal, and above all, the immaterial deflection now complained of, leave the contention without possible merit.

All authority, judicial or executive, cited *contra*, recognize the power in and conclusiveness of such acceptance by the Secretary. When there is added thereto the President's approval, we submit all room for discussion is closed.

III.

The Commissioner's Withdrawal of Indemnity Lands.

A.

The averment of the bill (Par. 9, pp. 9 and 10) simply is that such withdrawal was " unauthorized by and in violation of law."

Yet the grant, by act of July 25, 1866, sec. 4 (14 Stats. 289), expressly provided :

" That as soon as said Company shall file with the Sec- " retary of the Interior maps of its line, designating the " route thereof, it shall be the duty of said Secretary to " withdraw from the market *the lands granted by this act*, " in such manner as may be best calculated to effect the " purposes of this act, and subserve the public interest."

The decision of Mr. Secretary Browning of March 25,

1867, *supra* (Record of former case, pp. 65–67), directs the Commissioner that—

"If the even sections of land remaining to the United "States outside of the ten and within the twenty miles have "not been withdrawn, you will issue the necessary instruc- "tions to the land officers in Kansas withdrawing same."

The Secretary thus obeyed the law, and the Commissioner executed his order. The Company promptly made selection after construction of its road and acceptance thereof in July, 1870—the great bulk of lands here in suit being so selected in August, 1872—(Bill, Par. IX, Rec. p. 8). Patent of Nov. 3, 1873 (Rec. 21).

Hence there was plain statutory direction for the withdrawal, and no laches on the part of this Company in making selection thereunder.

The contention is made, *contra*, that the act of 1866 authorized withdrawal of the lands granted in the primary or ten miles limits only. The argument is not sound. Indemnity lands were equally *granted* by the act; executive practice to so withdraw *such* lands was known to Congress. The distinction is not supported by the language of the act. The direction for withdrawal was acted on in accord with the unvarying practice. This Court will not, we submit, twenty-three years later, change what has thus been done with full authority nor declare it ineffective.

Wolcott v. *Des Moines Co.*, 5 *Wall.* 681.

Forsyth v. *Wis. Cent. R.R. Co.*, 43 *Fed. Rep.* 867.

B.

Numerous decisions of this Court apply the doctrine of relation to these land grants, holding that by *identification* of the sections the title relates to the granting act as the source thereof. In primary limits such identification is

made by filing and approval of the map of definite location; as to indemnity lands by the act of selection. In each class the relation back to the grant is complete when the necessary identification of the thing granted is thus made ~~complete~~ certain. But "the lands granted by this act" of 1866 were equally of the indemnity class. Otherwise such indemnity lands would stand without any basis of title.

IV.

Alleged Excess of Lands Conveyed to the Company.

A.

This contention was made in the former case and overruled thus (118 U. S. p. 695):

"Another objection urged to the ownership of the lands "by this Company under the patents from the State of "Kansas is, that the Company has received more lands than "it was entitled to under the grant. We do not think it nec- "essary to enter into the details of the evidence of how much "land was granted, how much was found in place, and how "much the road was entitled to as indemnity for lands not "so found in place. In the first place, we are not at all "satisfied by the evidence in the Record that the lands re- "ceived are in excess of the various grants to this Com- "pany. In the next place, the issue is not made fairly in "the bill, and certainly no particular certificate nor any "particular patent from the State of Kansas is pointed out "as being the one which contains the excess over the grant, "and it is not possible for the Court, under any evidence or "any pleading, to ascertain which of these certificates and "of these patents, or what particular portions of them, "should be held void and what valid. (*United States* v. "*Burlington & Missouri River Railroad*, 98 U. S. 334.)"

Having thus failed both in pleading and proof in the former case, ought the United States to be heard *again* on

the same question here? We submit not. No newly discovered or material facts are plead here, arising since the former suit. The former decision and decree fairly included this proposition, and it is justly *res adjudicata*.

B.

The bill avers (Par. X, Rec. 10, 11, 12) that the Company has received patents for 796,929.14 acres, being 252,929.14 acres in excess "of what it is lawfully entitled "to." * * * "Said railroad having constructed but 85 "miles of railroad for which it is entitled to lands under "said grants."

The bill then attempts to explain this assertion by the following statements.

1st. That the road from initial point (Fort Riley or Junction City) to the southern boundary of the State is about 175 miles in length.

2d. That the Company never built its road under its land-grants further south than Parsons, 157 miles from its northern (Fort Riley) terminus, the road from Parsons south to the State line having been constructed as part of its main line from Hannibal, Mo., and for which it earned no lands (a contention wholly without merit).

3d. Assuming 157 miles as the length of the land-grant road, same extends for twenty miles through the prior Kansas Pacific R.R. grant; twenty additional miles through the Atchison, Topeka & Santa Fé Co.'s grant of 1863, and 29 miles through the "Osage Ceded Lands." Denying *any* right to lands in place in these overlaps and reservation, and *all right to indemnity* for lands thus appropriated thereby, the total length thereof, 69 miles, is deducted from the assumed land-grant length of 157 miles, leaving but 86 miles of aided land-grant road.

C.

But it happens that since the filing of this bill, and under date of August 2, 1890, the Secretary of the Interior has made and approved a full, final, and official adjustment of this Company's grant pursuant to the statutory duty imposed by the act of March 3, 1887 (24 Stats. p. 556), section one whereof directs—

"That the Secretary of the Interior be, and is hereby, "authorized and directed to immediately adjust, *in accord-* "*ance with the decisions of the Supreme Court*, each of the "railroad land grants made by Congress to aid in the con- "struction of railroads and heretofore unadjusted."

That adjustment and the Secretary's decision thereon is printed at large in the official published decisions of the Interior Department (11 Land Decisions, p. 130). Same is printed in full as an appendix hereto.

THEREFROM IT APPEARS THAT THIS COMPANY'S GRANTS ARE FOUND DEFICIENT JUST 389,458.93 ACRES, AND THERE ARE NO LANDS WITHIN THE LIMITS OF THE GRANTS NOW AVAILABLE TO SATISFY THIS GREAT LOSS.

In this official adjustment indemnity is allowed for lands in primary limits embraced within earlier grants or reservations. The Secretary thereon observes:

"The allowance of indemnity in accordance with the "principles announced in the case of Chicago, St. Paul, "Minneapolis and Omaha Ry. Co. (6 Land Decisions, 195) "is approved."

The decision thus cited, known as the "Omaha" case, was rendered by Mr. Secretary Lamar. Therein the whole subject is most carefully and ably considered, the decisions

of this Court are reviewed, and the conclusion is reached (p. 199):

"This plain language of the Supreme Court in the Bar-
"ney case seems to be conclusive of the questions presented,
"and to hold that lands so reserved for works of internal
"improvements when found within either granted or in-
"demnity limits are not to be taken under the railroad
"grant; but if such lands are of the designated sections,
"within the primary or granted limits of the road, then the
"Company is entitled to indemnity for all such lands so lost
"to the grant."

This decision was rendered on October 7, 1887. It has since been followed without deviation in the Land Department, and numbers of these railroad grants have been and are now being adjusted on the basis of the principle thus therein announced.

In the "Omaha" case the grant provided indemnity for lands "SOLD, RESERVED, OR OTHERWISE DISPOSED OF,
"* * OR TO WHICH THE RIGHT OF PRE-EMPTION OR HOME-
"STEAD HAS ATTACHED AS AFORESAID." (Act May 5, 1864, 13 Stats. 66.)

The grants of 1863, 1864, and 1866 to the Mo., Kans. & Texas Company similarly provide indemnity for lands—

"SOLD, RESERVED, OR OTHERWISE APPROPRIATED, OR
"TO WHICH THE RIGHTS OF PRE-EMPTION OR HOMESTEAD SET-
"TLEMENTS HAVE ATTACHED AS AFORESAID."

This principle of construction and the Omaha decision, *supra*, rests upon the decision of this Court in *Winona & St. Peter R.R. Co.* v. *Barney* (113 U. S. 618). That case presented the direct question as to the scope and effect of the indemnity grants, and speaking through Mr. Justice Field this Court said (p. 626):

"The acts of Congress in effect said:

"'We give to the State certain lands to aid in the con-
"'struction of railways lying along their respective routes,
"'provided they are not already disposed of, or the rights
"'of settlers under the laws of the United States have not
"'already attached to them, or they may not be disposed
"'of, or such rights may not have attached when the routes
"'are finally determined. If at that time it be found that
"'of the lands designated any have been disposed of, or
"'rights of settlers have attached to them, other equivalent
"'lands may be selected in their place within certain pre-
"'scribed limits.'"

And the Court continues—

"It is to no purpose to say against this construction that
"the Government could not grant what it did not own, and
"therefore could not have intended that its language should
"apply to lands which it had disposed of. As already said,
"the whole act must be read to reach the intention of the
"law-maker. It uses, indeed, words of grant, words which
"purport to convey what the grantor owns, and of course
"cannot operate upon lands with which the grantor has
"parted; and therefore when it afterwards provides for in-
"demnity for lost portions of the lands 'granted as afore-
"'said,' it means of the lands purporting to be covered by
"those terms.

* * * * *

"The language in Leavenworth, Lawrence & R.R. Co.
"*v. United States* (92 U. S. 733), is quoted as sanctioning
"the position of the appellant. The Court, speaking of
"the indemnity clause in the grant then under considera-
"tion, said its purpose was to give sections beyond the limit
"designated for those lost within it by the action of the
"Government between the date of the grant and the loca-
"tion of the road, but it did not say that this was its only
"purpose; and if the language must be construed as mean-
"ing that, it was a mere dictum, not essential to the decis-
"ion of the case. The question was, what lands could be
"taken for indemnity, not for what deficiencies indemnity

" could be had. And it was held that an Indian reserva-
" tion did not pass by the grant, and could not be taken as
" indemnity for the lands otherwise lost from it. There
" was no question before the Court for what deficiencies
" indemnity could be supplied."

This decision firmly settles the principle involved. It is being daily applied by the Land Department. Its application to this Company's grants is certain. Under it, this Company's grant (as stated by the Secretary's decision, *supra*, approving the adjustment) " REMAINS UNSATISFIED BY
" SEVERAL HUNDRED THOUSAND ACRES."

This authoritative finding controls this case and destroys all force in the Government's contention here.

D.

The assertion of the Bill (Rec. 13) that the road from Parsons to the south line of the State was *not* built under these land grants, but as part of this Company's road from Hannibal, Mo., is untrue. The act of 1866 makes a grant to aid construction of this road " from Fort Riley, Kansas,
" or near said military reservation, thence down the valley
" of the Neosho river *to the southern line of Kansas*, with a
" view to an extension of the same through a portion of the
" Indian Territory to Fort Smith, Arkansas."

The road was located, built, construction certified by the Governor, and accepted by the President under these land-grant acts. The *entire* road has always since been used by the Government at large saving in public transportation. The patents here in suit contain under the seal of the United States the distinct assertion of this fact (Rec. 21, 26, 28, 30), viz:

" That the said Missouri, Kansas and Texas Railway Com-
" pany has fully completed and equipped as required by the

" act (of 1866) *the said railroad from Junction City to the* " *southern boundary of the State of Kansas.*"

V.

THE ALLEGED NEW YORK INDIAN RESERVATION.

A.

In the report of the former case (118 U. S. p. 684) appears this statement of claim by the United States:

" *Sixth Proposition.*—It is submitted that the lands in " controversy are not subject to any land grant, because in- " cluded in the New York Indian Reservation under the " Treaty of January 15, 1838, never legally revoked."

And the subject is discussed on p. 133 of Mr. Lawrence's brief therein.

The Court swept this contention into the residuary clause of its decision, by observing—

" There are other grounds urged for granting the relief " sought by the bill, but they are not sufficient to justify " such a decree, *nor are they important enough to require* " *further discussion here.*"

The claim under this head in the former case necessarily covered *all* lands within this grant, whether of odd or even-numbered sections. Yet what this Court in that case declined to consider in detail, because not important enough to consume the time of the Court, is now solemnly alleged in *this* bill as ground for destroying our titles.

The question is *res adjudicata* by the former decision.

B.

The brief of our associate (Mr. Williams) fully discusses and disposes of this contention.

Furthermore, the decision of the present Secretary of the Interior, *supra*, approving the adjustment of this Company's land grant, states at length the facts connected therewith and announces conclusion *against* demand or suit for reconveyance of this Company's lands based thereon (see Appendix).

The Secretary's conclusions are stated in the official syllabus of his decision thus:

"The opinion expressed by the Department in 1860, that "the right of the Indians to lands in the New York Indian "reservation had lapsed, and the subsequent proclamation "of the President directing the sale of said lands, acted "upon for the period of thirty years, recognized by Con- "gress, and acquiesced in by the Indians, precludes depart- "mental action looking toward the recovery of title to lands "lying within said reservation and patented to this Com- "pany under its grant of 1863, and the acts amendatory "thereof."

One million and a quarter acres of land have been sold and granted under such proclamation. *All* titles therein would be jeopardized by this Court's *contra* decision, for the Bill avers (Rec. 14) that said Reservation has never been legally revoked and still remains operative. Yet the Secretary remarks that since the proclamation of 1860 "the "lands have been disposed of *and numerous towns have* "*grown up thereon.*"

Yet the Government here seems willing to cloud the titles to this vast area solely to reach and destroy these defendants' title to 40,000 acres of land. Against such contention we place the sound declaration of the present Secretary in his decision, *supra*, that—

"While there is force in the suggestion of your office "that the Executive ordinarily has not power to extinguish "a reservation created by treaty, in this case the expressed "opinion of this Department that the Indian right had

"lapsed, and the proclamation of the President following "thereupon, directing the sale of the land, acted upon for "thirty years, must be considered a bar to any further action "on the part of this Department looking to the disturbance "of titles long since vested thereunder. The proclamation "directed the sale of 1,222,240 acres of the 1,824,000 acres "embraced in the reserve. It was recommended by your "office and the Secretary. See Pueblo of San Francisco "(5 L. D. 483); Atlantic & Pacific R.R. Co. (8 *ibid*, 165); "United States *v.* Burlington & Missouri R.R. Co. (98 "U. S. 341)."

VI.

ALLEGED RESERVATION OF THE EVEN-SECTION LANDS IN LIMITS OF THE 1863 GRANT FROM INDEMNITY SELECTION UNDER THE 1866 GRANT.

A.

Briefly stated, this contention is that by the grant of 1863, embracing the *odd*-numbered sections, the *even*-numbered sections within the limits thereof were reserved to the United States solely, for disposal under the homestead law. And as the lands here in suit are part of such even-numbered sections falling within the limits of the 1863 grant for the road from Leavenworth *via* Lawrence to the southern line of Kansas, they were reserved from indemnity selection under the grant of 1866.

And this contention rests upon the asserted dual ground of legislative land-grant policy and executive construction thereof.

B.

It is conceded that the grant of July 26, 1866, to this Company, authorized selection of indemnity lands within that limit from both odd and even-numbered sections. The language of the granting act is that—

" It shall be the duty of the Secretary of the Interior to " cause to be selected for the purposes aforesaid, *from the pub-* " *lic lands of the United States nearest to the sections above* " *specified*, so much land as shall be equal to the amount of " such lands as the United States have sold, reserved, or " otherwise appropriated, or to which the right of homestead " settlement or pre-emption has attached as aforesaid." (14 Stat. 289.)

And that Congress *purposely* so provided is evident from the fact that on the immediately preceding days of July 23, 1866, and July 25, 1866 (14 Stats 210, 236), it granted lands to Kansas to aid two *other* roads therein, but required the indemnity lands therein to be selected from lands " de- " signated by odd numbers."

The motive therefor is readily seen. The grant and road overlapped the prior grant for the Kansas Pacific Co. made by the Pacific acts of 1862 and 1864. Numerous Indian Reservations (including the great Osage Reserve) covered that portion of the State. Enlargement of the scope of indemnity selection was requisite to protect the grant. Such necessity is demonstrated by the Secretary's recent adjustment of this Company's grants, *supra*, finding same deficient nearly four hundred thousand acres, and with no available lands remaining to satisfy this great loss.

C.

Brief *resumé* of land-grant legislation will disclose the expressed will and purpose of Congress with regard to the alternate sections remaining to the United States within these railroad land grants.

The first railroad grant (act of Sept. 20, 1850, to Illinois, Mississippi & Alabama, 9 Stats. 466) provided in section three—

"That the sections and parts of sections of land which, "by such grant, shall remain to the United States within "six miles on each side of said road and branches shall not "be sold for less than double the minimum price of the "public lands when sold."

The same language is found in the grant of Feb'y 9, 1853, to Arkansas and Missouri (10 Stats. 155).

The grant of May 17, 1856, to Florida and Alabama (11 Stats. 15) added to the above provision the following:

"Nor shall any of said lands become subject to private "entry until the same have been first offered at public sale "at the increased price."

And in this form were the acts of May 15, 1856, June 3, 1856, Aug. 11, 1856, and Mar. 3, 1857, made to numerous States (Stats., vol. 11, pp. 9, 17, 18, 20, 21, 30, 195).

The grant of March 3, 1863, to Kansas (12 Stats. 772) adds to all of foregoing, after the words "at public sale," the following:

"To the highest bidder, at or above the increased mini- "mum price, as aforesaid: *Provided*, That actual and *bona* "*fide* settlers, under the provisions of the pre-emption and "homestead laws of the United States, may, after due proof "of settlement, improvement, cultivation, and occupation, "as now provided by law, purchase the same, at the in- "creased minimum price aforesaid; *And provided also*, "That settlers on any of said reserved sections, under the "provisions of the homestead law, who improve, occupy, "and cultivate the same for a period of five years and com- "ply with the several conditions and requirements of said "act, shall be entitled to patents for an amount not exceed- "ing eighty acres each, anything in this act to the contrary "notwithstanding."

And in this form were the grants of May 12, 1864, to Iowa (13 Stats. 72); March 3, 1865, to Minnesota (13 Stats.

526); July 4, 1866, to Minnesota and Missouri (14 Stats. 83, 87); July 13 and 25, 1866, to California (14 Stats. 94, 239), and July 23, 25, and 26, 1866, to Kansas (14 Stats. 210, 236, 289).

D.

From foregoing recital it is plain that the lands which remain to the United States still retained their character of *public lands*. The earlier grants simply *increased* to double minimum the price therefor, and the 1856 grants expressed (what was before implied) that same should not be subject to private entry until after public offering at such increased price. But beginning with 1863, and thence onward, settlers were in terms permitted to purchase these remaining lands at the increased price, and the right of free homestead entry thereof was in terms recognized therein. And it should be understood that this enlarged provision of the law was first put in the very grant of 1863, to Kansas, which is here claimed to *except* these even-numbered sections from indemnity selection under the M., K. & T. Co.'s grant of 1866.

In other words, under the grant of 1863, the even-numbered sections remained subject to *purchase* by settlers at double minimum price, and to free homestead entry.

Why, then, were they not "*the public lands of the United States*," whereto the right of indemnity selection under the grant of 1866 was expressly applied?

Certainly, there is not upon the face of the 1863 grant *anything* to disclose that they were *not* such public lands. They were subject to settlement and purchase at double minimum price, and to free homestead. They were withheld from private entry *only* until first reoffered at the increased price.

None the less they were at all times public lands, and subject to disposal as such. Their withdrawal from

private entry by the grant of 1863 did not change their character as public land. They were still subject to the President's public proclamation for disposal at public sale. *They could not have been so offered*, if *not* public land. The *form* of disposal did not change their character, nor the fact that until reoffered at public sale they could not be purchased at private entry. Until so reoffered they were simply "out of market" for purchase at private entry, and nothing more. Yet to-day, by force of later legislation, no public offerings of public lands are made unless in special cases and by express act of Congress. Can it be said, however, that there are no public lands? And are lands within railroad limits not subject to disposal under the pre-emption, homestead, desert, timber, and general settlement laws?

Per contra, millions of acres have been thus entered under all the general land laws, and no decision can be found denying the power to make such disposal. Titles would be shaken throughout the entire West, made upon even-numbered sections in railroad limits under the pre-emption, timber culture, timber, desert, and similar laws, if this Court should hold such lands subject to entry only under the homestead law, as the United States here contends. The provision of the 1863 grant is common to all since made to the States, as the citations above given will attest.

In *Newhall* v. *Sanger* (92 U. S. 763) this Court said:

"The words 'public lands' are habitually used in our leg-
" islation to describe such as are subject to sale or other dis-
" posal under general laws."

And the Court adds:

"The subject of grants of land to aid in constructing
" works of internal improvement was fully considered at the
" present term in *L., L. & G. R.R. Co.* v. *United States*,

" *supra*, p. 733. We held that they did not embrace tracts " reserved by competent authority for any purpose or in any " manner, although no exception of them was made in the " grant themselves; and we confined a grant of every alter- " nate section of 'land' to such whereto the complete title " was absolutely vested in the United States."

But " complete title " was so " absolutely vested in the " United States " at the time of this Company's indemnity selection and issue of these patents thereon. The lands were " public " and " subject to sale or other disposal under " general laws " by the very terms of the 1863 grant. That they were not so subject to private entry cannot change the situation. The President had, by the terms of the act of 1863, the power to offer them at public sale. If the test of our right of selection was their *then* subjection to private entry, it may be answered by the suggestion that if they had *never* been offered at public sale they had *never* been subject to private entry *at any price*. Yet were they any the less " public lands ? "

But the contention is made that the policy of Congress has always been *not* to grant such alternate sections remaining to the United States within former grants, but to preserve same for disposal at the enhanced price to reimburse the Government for the lands so granted.

If such was the original policy, it is certain that before the passage of the grant of 1866 same had been changed, and has long since been wholly abandoned.

First. The very grant of 1863 here in question opens these even sections to free homesteads. The later grants in 1865 and 1866 repeat the same provisions.

Then, again, the railroad grants of 1856 to the States of Michigan and Wisconsin granted the odd-numbered sections; but the subsequent grant of March 3, 1863 (12 Stats. 797), for wagon roads, granted within same limits " every

"alternate section of land designated by *even* numbers," with indemnity "from the public lands of the United States "*as near to said even sections as may be*," and within a limit of fifteen miles.

SECOND. The grant of 1866 to this Company contains in sec. 2 (14 Stats. 289) the provision that the sections and parts of sections which "shall remain *in* the United States" within the primary or ten-mile limits shall not be sold for less than double the minimum price, &c "*Provided*, That "actual *bona fide* settlers under the pre-emption laws of the "United States may after due proof of settlement, improve- "ment, and occupation, as now provided by law, purchase "the same at the price fixed for said lands *at the date of* "*such settlement, improvement, and occupation.*"

Here is the plain provision that *after* the grant, and assumed increase in price, the settler may purchase at the *minimum* price if his settlement antedated the grant. Certainly *this* was not the policy of alternation and uniform increased price.

THIRD. Congress, by act of March 6, 1868 (15 Stats. 39), provided that nothing in the Pacific Railroad Act of July 1, 1862, and acts amendatory thereof—

"Shall be held to authorize the withdrawal or exclusion "from settlement and entry, under the provisions of the pre- "emption or homestead laws, the even-numbered sections "along the routes of the several roads therein mentioned "which have been or may be hereafter located: *Pro-* "*vided*, That such sections shall be rated at $2.50 per acre, "and subject only to entry under those laws; and the Sec- "retary of the Interior be, and is hereby, authorized and "directed to restore to homestead settlement, pre-emption, "or entry, according to existing laws, all the even-numbered "sections of land belonging to the Government, and now "withdrawn from market, on both sides of the Pacific Rail- "road and branches wherever said road and branches have "been definitely located."

Here again free homesteads are given in the lands thus assumed to be reserved for *sale* only at the double minimum price.

FOURTH. The act of June 8, 1872 (17 Stats, 333, R. S., Sec. 2304), extends to honorably discharged soldiers and sailors of the rebellion the right to make homestead entry for 160 acres, "including the alternate reserved sections of "public lands along the line of any railroad or other public "work not otherwise reserved or appropriated."

Here again is a *general* statute entirely destroying all possible claim of alternative policy and *sale* of such lands at double minimum price.

All of foregoing legislation was antecedent to the earliest selection by this Company of the lands here in suit, viz., Aug. 10 and 20, 1872 (Bill, Par. IX, Rec. 8, and Patent, Rec. 21).

And this Court has held that the status of indemnity land at date of *selection* determines the right of the Company thereto. If *then* public land, it is subject to selection regardless of any former claim or reservation.

Ryan v. *R.R. Co.*, 99 U. S. 382.

FIFTH. The act of March 13, 1874 (19 Stats. 21), permits timber culture entry on any quarter-section of any of the public lands of the United States, and contingent on planting of requisite trees and prescribed cultivation, free gift of the land is made.

SIXTH. The act of June 22, 1874 (18 Stats. p. 194), provides that any land-grant railroad, on relinquishing its prior right in favor of a subsequent settler, may select indemnity land therefor "from any of the public lands, not mineral, "and within the limits of the grant, not otherwise appropri-"ated at the date of selection, to which they shall receive "title the same as though originally granted."

Thereunder thousands of acres have been selected in both odd and even sections, and in both place and indemnity limits. The right has never been questioned by the Department where the land selected was vacant. Here is given by general law and in broadest terms double minimum even-numbered sections for such losses.

SEVENTH. The act of March 3, 1879 (20 Stats. 472), provides that thereafter "the even sections within the limits of "any grant of public lands to any railroad company, or to "any military road company, or to any State in aid of any "railroad or military road, shall be open to settlers under "the homestead laws to the extent of 160 acres to each "settler." And all persons who have been theretofore restricted to an entry of eighty acres of such lands are permitted to make an additional entry of eighty acres under prescribed conditions.

The foregoing legislation fully illustrates and supports our contention that from 1863 onward the suggested policy of *sale* of alternate sections remaining to the United States to compensate for the sections granted has been ignored and conditions of *free* disposal thereof constantly enlarged. It certainly does *not* support the Government's contention here.

Great stress is, however, laid upon certain executive rulings, predicated on early decisions of the Department, as sustaining the alleged theory of holding the alternate sections for *sale* to reimburse the United States for the sections granted.

The first is that of Mr. Secretary McClelland, of Nov. 20, 1855 (1 Lester Land Laws, 521), wherein it was held that the alternate sections remaining to the United States within the Illinois Central R.R. grant of Sept. 20, 1850, did not pass to the State under the subsequent swamp-land grant of Sept. 28, 1850.

Inspection of that decision will, however, show that on the same day of passage of the railroad grant (Sept. 20, 1850), the President withdrew *all* the land within its limits; that on adjustment of the grant in 1852, the remaining sections in the primary limits were offered at public sale, were sold and patented to such purchasers; that long afterward the State presented swamp claim to such sold and patented lands, and also to the lands selected by her and set apart for the railroad within the indemnity limits of the grant.

Whilst the Secretary held as claimed, he also decided that the State's silence in standing by and permitting the alternate sections in the place limits to be sold "should preclude "her now from setting up title adverse to patentees of the "same land." And, further, that selection by her own agents of indemnity lands in satisfaction of the railroad grant alike precluded her from setting up claim to the *same* lands under the swamp grant.

We fail to see how that decision affects the case at bar. At the time of the railroad and swamp grant (1850) this policy of withholding the alternate sections for reoffering and sale at the enhanced price was observed.

All lands within railroad limits were withdrawn instantly on passage of the law, the grant promptly adjusted, and the remaining sections speedily restored to market. But long prior to the grant of 1866 to this Company that practice had ceased; homestead and pre-emption entry on such alternate sections provided for; withdrawal was not made until by definite location of its road the *exact* limits of the grant were defined, and no attempt to reoffer the alternate sections was made. Hence the entire policy and practice both of legislation and of the Executive was far different then from that which prevailed in the early days of railroad land grants.

Again there is cited the decision of Secretary Thompson

of Oct. 28, 1859 (unreported). In that case two railroad land grants by acts of 1856 (11 Stats. 15 and 17), were made to Alabama for separate roads, each with right to select indemnity from "*alternate* sections or parts of sections." The indemnity limits of the roads overlapped. The State first selected the *odd*-numbered sections for one road, and later the even-numbered sections within such overlap for the other.

The Secretary denied the right to select the even sections, because destroying "the alternation which the act of the "3d of June, 1856, requires shall be observed in setting apart "the lands that have been granted to the States."

But this decision has no application here. The grants of 1856, there in question, required selection in "*alternate sec-* "*tions*," and as the Secretary ruled "alternate" to those which remained to the United States. But the grant of 1866 to this Company makes no such requirement. It expressly authorizes selection "from the public lands of the "United States *nearest* to the sections above specified," &c.

And singularly enough in the Attorney-General's brief in the former case (118 U. S. 682), in attacking our odd-section indemnity titles, he asserts (pp. 14 and 15):

"The provisions for indemnity under the two acts are "different. The provision in the act of 1863 confines the "indemnity to odd-numbered sections nearest the tiers of "sections granted; *that of* 1866 *to the sections nearest those* "*granted, whether odd or even.*

"*There is no proof even tending to show that there are* "*not even-numbered sections nearer the granted land than* "*the odd-numbered sections in controversy.*"

Notwithstanding this admission by the Government's highest law officer, we find the United States, defeated in that case, *now* seeking to destroy our even-numbered section titles *in the same County*, when in the former case this broad

admission of our right thereto was made of record in this Court! That admission should conclude the Government here.

Again, it is asserted that *no* decision of the Land Department can be found sustaining our right to these even-section lands.

In the record of the former case (118 U. S.) (Rec. 84–88) will be found a decision by Land Commissioner Williamson and concurring opinion by Mr. Secretary Schurz in favor of these titles, and declining to recommend suit to vacate same. The Secretary expressly says:

"After careful examination of the questions presented by " your letter and the accompanying brief and argument, I " am of opinion that there is no defect in the title of the " Missouri, Kansas and Texas Railroad Co. to the odd and " even sections of the land lying within the overlapping " limits of said roads, and that nothing would be gained by " attacking the outstanding patents in the courts."

Again, in the same record (pp. 78–80) will be found report of Land Commissioner McFarland, suggesting suit to settle the questions, and yet stating his own opinion in favor of the validity of these titles. Reference of his recommendation through the Attorney-General to the U. S. District Attorney brought the latter's response, advising *against* the suit and expressing entire confidence in these even-section titles.

Citation of Departmental decision in Atlantic & Pacific R.R. Co. *v.* Rogers is unfortunate. The recommendation for suit was never made as counsel allege. Upon answer of the Company to the rule therefor, Mr. Secretary Vilas held that the Company's title to the odd-numbered sections was perfect, notwithstanding the prior conveyance of the *even*-numbered sections in the same limits under an earlier grant (8 Land Decisions, p. 165).

Recently, renewed effort for suit has been dismissed by the present Hon. Attorney-General. We print his opinion as an appendix hereto. Such opinion fully indicates the sound views now entertained by the Government's highest law officer. They are in exact accord with our contention here, and upon the precise question here presented. They are all sufficient to demonstrate the soundness of our contention.

In so far as these M., K. & T. titles embrace even sections within the overlapping *indemnity* limits of the prior grant of 1863 to the L., L. & G. Co., same are beyond the possibility of controversy, within the descriptive terms of the act of 1866, and the definition of the term "public lands" as given by the Supreme Court in Newhall *v.* Sanger, *supra*. For by the act of 1863, the *status* of even sections within the indemnity limits of that grant was wholly unaffected thereby. They remained the same in price and disposable quality. All the "general laws" were operative thereon precisely as if the grant of 1863 had never been made. Such was their *status* when act of 1866 was passed, and being "public lands of the United States nearest to the tiers of "sections" granted, as appears by the recitals of the patents, they were in law and fact the precise lands which the act of 1866 required the grantee thereunder to take, and made it the duty of the Secretary "to cause to be" so taken.

Beyond all other considerations is the proposition that the *intent* of Congress must govern. As aptly said by this Court in M., K. & T. R'y *v.* K. P. R'y (97 U. S. 491, 497):

"It is always to be borne in mind in construing a Con-
"gressional grant, that the act by which it is made is a *law*
"as well as a conveyance, and that such effect must be given
"to it as will carry out the intent of Congress."

The power of Congress to thus grant these even-numbered sections cannot be doubted. It did grant them by express and apt words.

In *Railroad Co. v.* Baldwin (103 U. S. 423, 430), this Court said:

"We see no reason, therefore, for not giving to the words "of present grant with respect to the right of way the same "construction which we should be compelled to give ac- "cording to our repeated decisions to the grant of lands, "*had no limitations been expressed.*"

The only limitation expressed by the grant of 1866, with respect to indemnity lands, is that they shall be taken "from "the public lands of the United States nearest to the sec- "tions above specified."

Unless this Court shall hold that the lands in suit were *not* public lands, the act of 1866 gave such lands for the express purpose of satisfying the losses in its primary limits.

VII.

Claims of Alleged Settlers.

The Bill avers (Par. 9, Rec. 8–10) that sundry parties made settlement upon these lands prior to the selection thereof by the Railroad Company and some prior to the grant and withdrawal thereunder. It further alleges full compliance with law by such parties and their continual occupation of the premises.

A.

These assertions of the Bill are incorrect and immaterial.

The same averment was made in the Bill in the original case. (Rec. 1.)

Yet, upon answer and proof, not a scintilla of evidence was offered to show the actual existence of claims by any such parties. The contention was ignored by this Court's decision in the former case, and dismissed as too unimportant to require discussion.

B.

The brief of our associate (Mr. Williams), at pages 21 and 24, concisely answers this contention.

It is pertinent to add thereto, however—

1*st*. The application for this suit has been pressed for years; counsel claiming to represent these alleged settlers has enjoyed unbounded opportunity therefor before the Land Department and the Attorney-General. Notwithstanding this and after a lapse of years this Bill, whilst making general averments as to existence of such alleged settlers, concludes on this head with the statement that—

"Your orator says it is unable now to specifically state "what portions and tracts of said lands had been so "settled upon, occupied, and improved, and prays permission "to make proof thereon."

We respectfully submit that such indefinite form of pleading can not be maintained to put this Company and its numerous grantees upon answer and proof. And if with the opportunity of years the United States is still unadvised, both as to parties and tracts so claimed, it is persuasive proof that these alleged settlers are myths.

Furthermore, counsel for the alleged settlers cites but one case to show their existence (N. L. Ard.) His selection is unfortunate.

This party's claim has been heard and reheard before the Land Department, resulting in final decision by the Secretary Nov. 5, 1878, and Sept. 20, 1879, adverse to his rights.

We may well assume that this case is the strongest that counsel can present. The facts proved therein, on which the Department acted, showed no settlement or pre-emption right of any kind in Ard as attaching to this land, prior to its withdrawal in April, 1867, for this grant.

2d. The averment that these lands are occupied by such alleged settlers carries contradiction on the face of this record. Exhibit "B" attached to this bill (Rec. 16–20) and made part thereof is an abstract of title to the lands here in suit. It discloses over two hundred individual owners and mortgagees holding tracts of from less than 40 acres up to 160 acres. It is impossible to believe that this numerous body of owners have simply paper titles and that these alleged settlers are holding possession of the lands.

3rd. Full opportunity was accorded these parties to be heard in the usual way in the Land Department. The *quasi judicial* practice of that Department (so well known to this Court) provides ample opportunity for presentation and adjudication of all claims to the public lands. Such adjudication was had in every case presented within this Company's grants, and the controvery decided upon the facts and law applicable thereto. We speak with knowledge, for we have been the Company's Counsel in Washington charged with this business for more than twenty years.

4th. Upon a most general allegation of the Bill, coupled with admission of inability to state individuals or tracts so claimed, we submit this Court will not destroy titles which have existed for nearly eighteen years, and have passed through numerous hands in small holdings. The equity these purchasers possess entitles them to protection far beyond that which can be suggested for the mythical clientage claimed by Mr. Lawrence. As the Court below well observed (Rec. p. 39):

"So far as any claim is made in reference to particular "tracts upon which a homestead or pre-emption settle- "ment was made, before any rights of the Railroad Company "attached is concerned, it is enough to say that equity does "not interfere when there is a full and adequate remedy at "law, and these parties can under the settled practice of "Kansas obtain full protection of their individual rights, "without the interference of the United States as plaintiff. "Furthermore, it may be observed that under the ruling in "the United States *v.* San Jacinto Tin Company(125 U. S. "273) it is questionable whether the Government can main- "tain a Bill to set aside a patent in order simply to protect "the rights of an individual claim."

In the case cited this Court said:

"And if it is apparent that the suit is brought for the benefit "of some third party, and that the United States has no "pecuniary interest in the remedy sought, and is under "no obligation to the party who will be benefited to sustain "an action for his use; in short, if there does not appear "any obligation on the part of the United States to the "public, or to any individual, or any interest of its own, "it can no more sustain such an action than any private "person could under similar circumstances."

CONCLUSION.

In conclusion, we cannot forbear to suggest that, as shown by the Secretary's recent adjustment of this grant (Appendix), its net area is found to be 1,006,731 acres; its loss in primary limits 882,411 acres; its receipt as indemnity, *including the lands here in suit*, 494,072 acres, leaving the grant deficient 388,338 acres, for which enormous loss, exceeding one-third of the original grant, no land is now available.

And yet the United States has relentlessly pursued this Company and its numerous grantees. Case after case has

been brought to vacate its titles made by the Government's own officers in execution of the grant, until the holders of title thereunder feel that the Government is unjustly oppressing them to satisfy the demands of a few clamorous malcontents, who simply covet what they have purchased in good faith and for valuable consideration.

The numerous decisions of this Court uphold with firm hand the dignity and force which attends the Government's patent for the public domain. They equally recognize the protecting and controlling equities of purchasers thereunder in good faith, and without copious citation of all these numerous authorities so familiar to the Bench and Bar, we respectfully submit that this case falls fully within their reasoning and operation. And it may well be added that if every disappointed suitor before the Land Department may as of right demand suit by the Government to vacate titles issued by its authorized officers, the patent of the Government will become a most cheap and unstable reliance until it has passed the ordeal and stood the test of judicial scrutiny, at the instance of the Government. The case at bar fully illustrates our contention. These titles were made nearly eighteen years ago. They have passed through numerous hands. The Railway Company as original grantee is unable to respond upon its warranty of title to these numerous purchasers. The Government's demand is stale; is, we believe, unjustly pressed, and after the lapse of so many years, vacation of these titles made by its own officers with all the knowledge which surrounds the subject to-day will simply result in wide-spread injury to individual citizens and will not subserve any just interest.

The construction of law under which the patents issued has the sanction of legislative action and executive recognition. The title should be sustained as a matter of good faith, unless such gross fraud was practised in their procure-

ment of which the purchasers were bound to take notice, and of which there is not the slightest suggestion. The objections to our title now made by the Government in this case, in so far as same are not already disposed of by the former decision of this court in a sweeping sentence, are purely technical. The United States had full title to the lands conveyed, and they are within the description of the grant. When the Government conveyed these lands to the M.,K. & T. R'y Co., it was in possession of every fact which is now of possible existence, including those which are so partially and improperly stated in the present bill.

In *United States* v. *Flint* (4 *Sawyer* 42, affirmed by this Court in 98 U. S. 61), Mr. Justice Field said:

"Although, on grounds of wise public policy, no statute
" of limitation runs against the United States, and no laches
" in bringing a suit can be imputed to them, yet the facility
" with which the truth could originally have been shown by
" them if different from the finding made, *the changed con-*
" *dition of the parties and of the property from lapse of*
" *time*, the difficulty from this cause of meeting objections
" which might, perhaps, at the time, have been readily ex-
" plained, and the acquisition of interests by third parties
" upon faith of the decree, are elements which will always
" be considered by the Court in determining whether it be
" equitable to grant the relief prayed. All the attendant
" circumstances of each case will be weighed, that no wrong
" be done to the citizen, though the Government be the
" suitor against him."

And this Court in the *Maxwell Land-grant Case* (121 U. S. 325, 381) tersely stated the accumulated wisdom of judicial exposition on this head by declaring:

" We take the general doctrine to be, that when in a court
" of equity it is proposed to set aside, to annul, or to cor-
" rect a written instrument for fraud or mistake in the ex-
" ecution of the instrument itself, the testimony on which

" this is done must be clear, unequivocal, and convincing,
" and that it cannot be done upon a bare preponderance of
" evidence which leaves the issue in doubt. If the prop-
" osition, as thus laid down in the cases cited, is sound in
" regard to the ordinary contracts of private individuals,
" how much more should it be observed where the attempt
" is to annul the grants, the patents, and other solemn
" evidences of title emanating from the Government of
" the United States under its official seal. In this class
" of cases, the respect due to a patent, the presump-
" tions that all the preceding steps required by the law
" had been observed before its issue, the immense import-
" ance and necessity of the stability of title dependent upon
" these official instruments, demand that the effort to set
" them aside, to annul them or to correct mistakes in them,
" should only be successful when the allegations on which
" this is attempted are clearly stated and fully sustained by
" proof. It is not to be admitted that the titles by which
" so much property in this country and so many rights are
" held, purporting to emanate from the authoritative action
" of the officers of the Government, and as in this case,
" under the seal and signature of the President of the
" United States himself, shall be dependent upon the hazard
" of successful resistance to the whims and caprices of every
" person who chooses to attack them in a court of justice;
" but it should be well understood that only that class of
" evidence which commands respect and that amount of it
" which produces conviction shall make such an attempt
" successful."

With these lands in the unclouded ownership of the United States; with a grant by Congress clearly embracing same within its descriptive words; with full jurisdiction existing in and duty imposed thereby upon the Secretary of the Interior to indicate by his approval the selection of such indemnity lands to satisfy this grant; with the road fully constructed far within the time prescribed therefor; with State and Federal acceptance of such construction by the officers thereunto authorized as a special tribunal

for such purpose; with the continual use of this road at large saving of cost to the Government in the transportation of its mails, troops, and property; with the title created under solemn form of patent and put forth upon the world; with the distribution of that title through several hundred innocent purchasers in small holdings; with community interests, and credit firmly based thereon, and finally, with a grant deficient more than one-third of the promised aid, we submit these titles ought not now to be disturbed.

We ask that the decree below be affirmed.

A. T. BRITTON,
A. B. BROWNE,
Attys. for Appellees.

SIMON STERNE,
Of Counsel for M., K. & T. Ry. Co.
JAMES HAGERMAN,
Of Counsel for Receivers.

APPENDIX.

RAILROAD GRANT—ADJUSTMENT—RESERVATION—LATERAL LIMITS.

MISSOURI, KANSAS, AND TEXAS RY. CO.

The opinion expressed by the Department in 1860 that the right of the Indians to lands in the New York Indian reservation had lapsed, and the subsequent proclamation of the President directing the sale of said lands, acted upon for the period of thirty years, recognized by Congress, and acquiesced in by the Indians, precludes departmental action looking toward the recovery of title to lands lying within said reservation, and patented to this company under its grant of 1863, and the acts amendatory thereof.

The lateral limits of the grant, as fixed by the original withdrawals, should not be readjusted with the view of recovering title to lands patented to said company, that may thus be shown to lie outside of said limits as readjusted, for (1) the title to said lands has passed out of the company; (2) it must be presumed that in making the original withdrawals all matters necessary to a legal determination were duly considered; and (3) the said withdrawals have stood unquestioned for a long term of years, and titles that have vested thereunder should not now be disturbed.

The allowance of indemnity in accordance with the principles announced in the case of the Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 6 L. D., 195, is approved.

Secretary Noble to the Commissioner of the General Land Office, August 2, 1890.

By letter of July 21, 1887, your office transmitted an "adjustment" of the grant for the Missouri, Kansas and Texas Railway Company, and stated that, "The limits of the grant upon which withdrawals were ordered were laid off before all the lands were surveyed, and as to surveyed lands the withdrawal limits were not adjusted to the smallest legal subdivisions. Your office further stated that it became necessary, therefore, to define the exterior limits of the grant accurately, but adjusted to the smallest legal subdivisions of

the public surveys. "This made some slight variations on the extreme outward limits, and also disclosed an error in the withdrawal maps in this, that in closing the public surveys upon the first guide meridian east of the 6th principal meridian the range thus made was two miles in width instead of one mile, and as a result of which the limits of the grant had been laid down one mile too wide wherever such range was embraced within the limits of the withdrawal." Your office accordingly prepared and submitted "a map showing with precision the lateral limits of the grant in conformity with the principles laid down in the case of Leander Scott *v.* Kansas Pacific Railway Company (5 L. D. 468)," and made the adjustment of the grant in accordance therewith.

Continuing, your said office letter set out the various amounts of land patented for said Company, and concluded that it had received an excess of 271,907.86½ acres above what it is entitled to, and recommended that proper steps be taken to recover said excess from the Company.

By letter of June 21, 1889, said adjustment was returned to your office with directions that the questions involved be again examined and a report submitted in accordance with the present rulings of the Department.

On November 18, 1889, your office transmitted a second adjustment of said grant in which the following statement is made:

Total area of grant		1,134,791.08
Deduct on account of moieties:		
A. T. and S. F.	37,161.14	
L. L. and G.	90,898.74	
		128,059.88
Net area of grant		1,006,731.20
Approved in granted limits	122,656.53	
to L. L. and G. within clear limits	1,663.36	
		124,319.89
Loss to grant		882,411.31
Approved as indemnity		494,072.38
Due as indemnity		388,338.93

I understand from this that the Company has failed by 388,338.93 acres, to secure the total number of acres in its grant, after deducting moieties for grants of even date.

The explanation of the different results reached by said adjustments is stated by your office as follows:

"In the former adjustment deduction was made on account of prior grants for railroads, Indian reservations, and selections on account of grants to the State for internal improvements, etc. These deductions, under Departmental decision in the matter of the adjustment of the grant for the Omaha Company (6 L. D. 195), are erroneous, and in the adjustment now presented indemnity has been allowed for such losses."

The Company claims its lands by virtue of the grants of March 3, 1863 (12 Stat. 772), July 1, 1864 (13 Stat. 339), and July 26, 1866 (14 Stat. 289). The first act makes a grant for the Atchison, Topeka and Santa Fé road with a branch from where it crosses the Neosho, down the Neosho valley to a point where the Leavenworth, Lawrence and Galveston road enters said valley. The line of said branch as definitely located left the main stem at Emporia and ran southeasterly, corresponding with the road as afterwards built. The withdrawal for the branch was made in 1863. The act of 1864 provided for a road from Emporia, northward, *via* Council Grove, to a point near Fort Riley on the branch Union Pacific Railroad. No action was taken under this act affecting the questions here in issue. The act of 1866 provided for a road from Fort Riley "or near said military reservation, thence down the valley of the Neosho river to the southern line of the State of Kansas," being the line defined in said two former acts. The withdrawal necessary for the entire line was made in 1867, and the road was built. The grant was of "every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, not exceeding in all ten sections per mile, with a provision for indemnity lands to be selected not beyond twenty miles from the line of the road.

By letter of October 31, 1887, your office referring to said first adjustment stated that an important matter in connection with said grant had not been taken into consideration in making up the statement of areas included in the grant. This important matter was described by your office as follows:

"A portion of the lands through which this and certain "other roads run is embraced in the reservation established "for the New York Indians by treaty of January 15, 1838, "(7 Stat. 550), and that reservation does not appear to have "been extinguished at date of railroad grants, and has never "been extinguished"

Your office further stated that on August 17, 1860, the Commissioner of the General Land Office submitted to this Department a proposed proclamation for the sale of the lands within said reservation, which proclamation was signed by the President on August 21, 1860, in conformity with which said lands were offered for sale; that said Commissioner apparently assumed the reservation had been extinguished, and that assumption was erroneous as shown by the action of the Government in 1868, when "a treaty was concluded between the United States and the New York Indians for the surrender of all claims under the treaty of 1838, but the treaty of 1868 was not ratified by the Senate;" that "it cannot of course be held that the President intended by proclamation *of sale* to have formally or actually extinguished a treaty reservation, or that it would have been competent for him to have done so. * * * Reserved lands were not granted to such companies, and their rights are derived from grant, and not from executive action." It was further stated that 276,602.24 acres have been patented to or for railroad companies in said reservation, mostly for the Company here in question, and it was recommended that proper steps be taken to secure the reconveyance or recovery of such lands under the provisions of the act of March 3, 1887.

Against this recommendation the attorneys for the Company urge that the question has become *res adjudicata* by virtue of the decision of the Supreme Court in the case of Kansas City, Lawrence and South Kansas R.R. Co. *v.* The Attorney-General (118 U. S. 682). That action was brought to set aside the title to certain lands, being a portion of those herein under consideration. The appellant Company, *supra*, claimed as the assignee of the Missouri, Kansas and Texas Ry. Co. The Court held that there was no sufficient reason found in the record for disturbing the certificates and patents

therefor issued to said latter Company. In the statement of said case which precedes the opinion of the Court it is recited:

"Mr. William Lawrence (representing settlers), for appellee, argued the following general propositions: * * * Sixth "Proposition. It is submitted that the lands in controversy "are not subject to any land grant, because included in the "New York Indian reservation under the treaty of January "15, 1838, never legally revoked."

After considering certain allegations of the bill, and concluding that they furnished no reason for disturbing said titles, the Court concluded:

"There are other grounds urged for granting the relief "sought by the bill, but they are not sufficient to justify such "a decree, nor are they important enough to require further "discussion here."

On this statement it is claimed by said attorneys that the question here presented was properly before the court, and decided. An examination of the record of that case, however, shows that such claim is not well founded. The question now before me was not put in issue by the pleadings in that case. The New York Indian reservation was not mentioned, either in the bill, the answer or the replication, nor was any reference made thereto. The bill urged that the lands were excepted from the grant for the Missouri, Kansas and Texas road by reason of conflict with other railroad grants; because the road was not constructed to a certain point contemplated in the grant; and because the Company had received more lands than it was entitled to, etc. After considering these three propositions the Court concluded with the expression above cited. But the "other grounds" there spoken of must be held to be those put in issue by the pleadings, of which there were several. Certainly no judgment could have gone against the Company, on the record, on a plea which it had no opportunity of answering, nor do I think the mere mention of an extraneous fact by an attorney in argument would place that fact in issue, "where the second action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as

to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." (Cromwell *v.* County of Sac, 94 U. S. 351).

However, I find myself unable to agree in said recommendation that steps be taken to secure the reconveyance of these lands under the act of March 3, 1887, for the following reasons:

By said treaty of 1838 the New York Indians ceded and relinquished to the United States all their right, title, and interest to the lands secured to them at Green Bay, in the Territory of Wisconsin, by the Menomonee treaty of 1831 (except a small tract); and in consideration thereof the United States agreed to set apart the land subsequently embraced in said New York Indian reservation, "to have and to hold the same in fee-simple to the said tribes or nations of Indians, by patent from the President of the United States" issued in conformity with section 3 of the act of May 28, 1830 (4 Stats. 411), the proviso of which declares that "such lands shall revert to the United States if the Indians become extinct or abandon the same." It was agreed that said Indians then residing in New York should remove to said lands so set apart, and that such of the tribes as fail "to accept and agree to remove" within five years "or such other time as the President may from time to time appoint shall forfeit all interest in the lands so set apart to the United States." The United States agreed to appropriate $400,000 to aid said Indians in removing from their homes, etc. But few of the Indians went to said lands, and of these but thirty-two received "certificates of allotment" for their respective shares of land. In a report to the Department, subsequently transmitted to Congress, and dated February 9, 1883, Commissioner of Indian Affairs Price stated that no time was ever fixed by the President within which the removal must be made, that but $20,477.50, of the $400,000 promised, were appropriated, and that on the other hand the Indians, in any considerable numbers, never manifested a desire to remove to the western lands, but on the contrary opposed such removal.

In a letter dated April 19, 1858, to the chairman of the Committee on Indian Affairs of the House of Represent-

atives in reference to a bill then pending affecting these lands, Secretary Thompson said (Vol. 3, p. 93, Ind. Div.):

"The Indians who have failed to remove have by the ex-
"press terms of the treaty of 1838 forfeited their title to
"the reserve, and a due regard for the interest of the white
"population of Kansas would seem to require that this
"large and valuable body of land should no longer be with-
"held from settlement."

On June 16, 1860, he wrote to the Commissioner of Indian Affairs, as follows (Vol. 3, p. 327, Ind. Div.):

"Herewith is returned, with my approval endorsed thereon,
"the list of locations made for the New York Indians, in
"Kansas, which was transmitted with your report of the
"9th inst.

"Your recommendation that the balance of the tract
"heretofore reserved for the New York Indians in Kansas
"be turned over to the General Land Office, to be disposed
"of as other public lands, is approved, and you will so in-
"form the Commissioner."

The proclamation of the President of 1860, referred to by your office, thereafter directed public sale in certain townships of the public lands not covered by individual Indian locations "in the late" New York Indian reservation. From that time at least the lands in said reservation have been treated as subject to the operation of the land laws. Meanwhile the lands have been disposed of and numerous towns have grown up thereon. On November 5, 1857 (11 Stat. 735), a treaty was concluded with the Tonawanda band of Senecas (one of said tribes), by which said band relinquished all its claims to said land under the treaty of 1838, in consideration of which the United States agreed to pay and invest for them the sum of $256,000. On June 20, 1884, the Senate Committee on Indian Affairs referred to the Court of Claims a bill to provide for a settlement with said New York Indians for the "unexecuted stipulation" of said treaty of 1838. Thereupon suit was entered praying for a money indemnity in lieu of said lands so lost. The suit is still pending. It does not appear that the Indians are now making claim for the land itself.

It thus appears that for thirty years both the executive

limits of such withdrawals. It should be presumed that the Secretary considered all matters necessary to a proper and legal determination of the questions before him. His action in this matter has been followed, unquestioned, for many years, though the existence of the irregular survey must have been known. Under these circumstances I cannot conceive it to be the duty of the Department to reopen this question, *sua sponte*, and take steps looking to the disturbance of titles so vested. But if this view is not conclusive, the question must be disposed of with that relating to the lands which now appear to be beyond the limits by reason of a more accurate measurement. It should be premised that the grant remains unsatisfied by several hundred thousand acres. During the many years intervening since the withdrawals, the accuracy of the limits has not been questioned. Meanwhile the lands, sparsely settled in 1867, have been practically all disposed of. Titles that vested under the deliberate action of the Department have passed from hand to hand many times. Under these circumstances, as was said by Secretary Vilas, in the case of St. Paul, Minneapolis and Manitoba Ry. Co. (8 L. D. 255), I am compelled to recognize at the outset that the question is presented at such a time and under such conditions as impose limitations upon judgment which would not affect its examination as an original question.

The question here is between the Government and the Company. If the original withdrawals were erroneous, the fault is due to the Government and not the Company. "If it be inequitable to grant the relief prayed against a citizen, such relief will be refused by a court of equity, though the United States be the suitor" said Mr. Justice Field in delivering the opinion of the Court in the case of United States *v.* Flint (4 Sawyer, 58, affirmed in 98 U. S. 61). He further said, after stating that no laches in bringing suit can be imputed to the United States—

"Yet the facility with which the truth could have been "originally shown by them * * * the changed condi- "tion of parties and property from lapse of time; the diffi- "culty from this cause of meeting objections which might "perhaps at the time have been readily explained; and

" the acquisition of interests by third parties upon the faith " of the decree, are elements which will always be consid- " ered by the Court in determining whether it be equitable " to grant the relief prayed. All the attendant circum- " stances will be weighed, that no wrong be done to the " citizens, though the Government be the suitor."

In the case of the Atlantic and Pacific R.R. Co. (8 L. D. 165), it was said:

" Under such circumstances, and after the lapse of so " many years, many decisions of the Supreme Court demon- " strate that it cannot be expected the patents would be set " aside and thereby the property rights acquired under them " and so long enjoyed without challenge sacrificed by a " different interpretation of the granting act from that " which was deliberately adopted and acted upon. The " only probable consequence of instituting such a litigation " would be uncertainty, depreciation of values for a time, " and distress to a large community and numerous citizens."

I therefore conclude, basing my judgment on the decisions of the courts and the Department, and on the equitable considerations in favor of the vested titles, that no action should be taken by this Department looking to a readjustment of said limits.

In your said letter of November 18, 1889, you say:

" In the former adjustment a change was made not only " in the limits of the grant for the road under consideration, " but all roads coming in conflict therewith, the limits were " changed as far as the conflict extended."

The other roads referred to are I presume the Atchison, Topeka and Santa Fé, the Leavenworth, Lawrence and Galveston Roads, under the act of 1863, and the Union Pacific by act of 1862. On the principles above announced these limits should not be re-adjusted within the limits of this road, at least for any purpose looking to the disturbance of titles so vested.

You further state:

" From Emporia southward in the conflict with the grant " for the Atchison, Topeka and Santa Fé R.R. Co., the " grant is of even date, while north of this point the grant " for the latter Company is the prior grant, and upon estab-

"lishing a terminal at this point to separate the grants, it is "found that the Missouri, Kansas and Texas R.R. Co. re- "ceived patents for 6,845.62 acres north of said terminal. "Until the adjustment submitted by Mr. Sparks, no terminal "was ever established, but the line of the Atchison, Topeka "and Santa Fé R.R. seems to have been the dividing line "recognized at the time the lands were patented.

"In the conflict between said Companies the Missouri, "Kansas and Texas R.R. Co. received patents for 12,653.92 "acres as indemnity, of lands situated within the primary "limits of the grant of the Atchison, Topeka and Santa Fé "R.R. Co., and in the conflict with the Leavenworth, Law- "rence and Galveston R.R. Co., the Missouri, Kansas and "Texas R.R. Co. received patents for 6,315.93 acres as in- "demnity, which are shown to be within the primary limits "of the grant for the Leavenworth, Lawrence and Galves- "ton Co.

"In the adjustment herewith submitted the Company is "charged with receiving these lands, but as it is clearly "shown that, as the adjustment stands, the Company is en- "titled to more land than could be found within its limits, "a further consideration of the matter, as affects the ad- "justment, is unnecessary."

As the title to these lands so patented is not disputed by either of the other Companies, I do not find it necessary for the purposes of this case to consider this question further.

The allowance of indemnity in accordance with the principles announced in the case of Chicago, St. Paul, Minneapolis and Omaha Ry. Co. (6 L. D. 195) is approved.

Said first adjustment is accordingly modified, and that submitted by your letter of November 18, 1889, is approved.

In your letter of December 12, 1889, it is shown that there is "due as indemnity" to the Company 389,458.93 acres, instead of 389,338.93 as appeared from the former letter.

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *January* 8, 1891.

The SECRETARY OF THE INTERIOR.

SIR: I have the honor to acknowledge receipt of your

letter of the 11th ult., relative to a proposed suit to cancel certifications to certain lands in Missouri, issued for the benefit of the A. and P. R.R. Co., said Company being now represented by its successor, the St. L. and S. F. R.R. Co.

You recommend the institution of such a suit provided I should be "of the opinion that such suit can be maintained." You are moved to this recommendation because it appears to you "the only way to quiet the title to these lands and put the matter forever at rest between the petitioners and the Company." I do not understand that you express a view differing in any further particular than the one just stated from the published opinion of your immediate predecessor to which you refer. You affirm that you do not consider yourself bound by that decision, but I do not consider that you intended by this statement to imply any expression of opinion on the views of the law points taken in that decision. I, therefore, have less hesitation than I otherwise should in saying that in my opinion a successful action could not be maintained by the Government and that suit should not be brought.

The whole question had its origin, I believe, or at least its greatest encouragement, in the activities of Commissioner Sparks, and the papers do not disclose a presentative of any further legal grounds than those set forth in his letter of June 3, 1886, to Secretary Lamar. He bases his recommendation in two reasons:

First. That under the grant of 1852, the ungranted odd sections in the six-mile limits were reserved by the Government, and hence excepted from the grant of 1866.

Second. That the deductions for lands granted under the act of 1852 were not properly made as provided under the grant of 1866. This last act, to a general grant of a maximum of ten sections per mile when the road should pass through a State, annexed a proviso that whenever the grantee Company should construct its road over a route already benefited by any previous grant the amount of such previous grant should be deducted.

Commissioner Sparks did not specify what he considered the proper construction, but I infer from some of the circumstances that, for the 89 miles constructed over the

route benefited by the grant of 1852, he thought no lands could be claimed in excess of six sections per mile as under that grant. The General Land Office in administering the grant made a deduction from the total, but did not, however, exceed the maximum limitation of ten sections per mile when the road should pass through a State; I believe the Railroad in question has not received quite so much as ten sections per mile for road actually constructed in the State of Missouri.

The first point. As to the lands in question being reserved seems to me settled beyond controversy by Clements *v.* Warner (24 How. 394), quoted by Secretary Vilas. The lands lose their character of reserved lands when, having been offered at public sale, they are restored to entry. Commissioner Sparks maintained that Congress could not have intended to convey a solid block of land by the two grants, and that the grant of 1852 giving the even sections and retaining the odd sections at the enchanced price was a reservation exempting them from the specific language of the grant of 1856 giving the odd sections, except in case of reserved lands. The only serious point is as to lands being reserved. The case above cited settles that, and leaves us with clear, unambiguous language to deal with. The grant is not in obscure terms, and we cannot hold, in order to maintain a theory of our own as to what Congress intended, that by negligence and mistake Congress used language which, though clear and consistent in itself, still defeats its intent.

As to the second part, the administration of the grant, I do not think we can present any legal grounds of objection. The proviso of the Act of 1866 is for a deduction of the "amount," and it seems to me to have as the only restriction a condition that the grantee company shall not receive over ten sections per mile, counting the lands already received by its predecessor. I understand from the papers that maximum has not been exceeded. If the case were simply upon the issues above indicated, I should think it my duty to advise you that in my opinion suit would be unsuccessful and should not be brought, but there are other reasons which seem to me still more cogent. It appears that the lands are almost al-

together in the hands of *bona fide* purchasers without notice. We could not recover from them. It would seem to me unjust to attempt it. In addition to this and as a cumulative reason, I cannot refrain from saying that I have a very great hesitation in attacking patents which have been standing for any considerable length of time. In this case, even if there were original error, and I think there was not, no individual has been injured, and the theoretical injury to the general public is a much more tolerable calamity than would be the actual undeniable hardship of a threatening suit, which would cast some degree of discredit on these titles and cripple business and dealings on the faith of them. I do not think the local agitation for the cancellation of these certifications has good legal grounds; it does not present doubtful legal questions to be solved. I do not think we should be justified in discrediting due and formal titles from the Government in order to set at rest some unwarranted doubts in the minds of individuals who are no further injured than that they lose a hoped-for privilege of homestead entry on the lands in question. The injury to them is that they find it impossible to acquire a right they might have if we should cancel the certifications. It seems to me that vested rights have the priority. My conclusion therefore is that the suit should not be attempted, and I am further strengthened in this view by the uniform expression of the Supreme Court within the last four years intended to discourage all actions of the Government attacking its own patents.

These expressions are unequivocal, and would be a cause for hesitation were not the other reasons conclusive.

Respectfully,

W. H. H. MILLER,
Attorney-General.

Office Supreme Court U. S.
FILED,
MAR 7 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1890. NO. 733.

Appeal from the Circuit Court of the United States, District of Kansas.

THE UNITED STATES,

Appellant,

VS.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, et al.,

Appellees.

Reply for Appellee, Missouri, Kansas & Texas Railway Company, to Brief for the United States.

SIMON STERNE,

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New York.

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Supreme Court of the United States,

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No. 733.
Appeal from the Circuit Court of the United States, District of Kansas.

Reply of Appellee, Missouri, Kansas & Texas Railway Company, to Brief for the United States.

Without repeating a statement of facts, but referring to and adopting for such a statement that which is contained in the main brief on behalf of the appellees in this case and the statement contained in the argument by Mr. Williams, I as counsel for the Missouri, Kansas & Texas Railway Company desire, in addition to the observations and points presented in such briefs, to make a few points and suggestions herein more strictly pertinent in reply to the one point which is made by the brief for the United States, and in sixty-six pages of the brief of Mr. Lawrence, and which is the only point, in the opinion of counsel for the railway company, that was not in terms presented, although I claim it was in substance disposed of in the case of Railroad Company *vs.* Attorney-General, 118 U. S., 682.

The argument made by Mr. Maury is to the effect that inasmuch as the Act of Congress of March 3, 1863, granted to the Missouri, Kansas & Texas Railway Company odd sections only, within the ten-mile limit, and gave a right of indemnity to the company for lands which had been previously disposed of by the United States within an indemnity limit of twenty miles from the road, out of odd-numbered sections only, that indicated a purpose to reserve the even-numbered sections as part of the public domain. Doubtless the act of 1863 did so, because it said so.

Mr. Maury further urges the proposition that although the act of July 26, 1866, making a supplemental grant to the Missouri, Kansas & Texas Railway Company, in express terms, says:

> "In case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States *nearest to the sections above specified*, so much land as shall be equal to the amount of such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said Company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act,"

that the selection of such indemnity lands shall be likewise confined to odd-numbered sections only, in entire

disregard of the fact that they are to be taken from the public lands "*nearest* to the sections above specified" (the odd sections specified by direct grant), and without limitation of either odd or even numbers of sections, and he asks that that interpretation shall now be made by this Court, twenty years after the last of these lands had been set apart for and held by the State of Kansas for the use of the said Company, and fifteen years after they had been patented to the Railway Company by the solemn act of the Government of the United States. (1873-1876 inclusive.) This grave injustice, wrong and disturbance of titles of hundreds of people who have become grantees from the Missouri, Kansas & Texas Railway Company is sought to be consummated on the flimsy grounds that, notwithstanding the entire absence of all reservation for indemnity purposes of the even numbered sections in the act of July 26, 1866, it is to be assumed that the even numbered sections were not open for selection because a grant more than three years prior to the passage of this act, to wit, the act of 1863, gave to the railways therein mentioned the odd sections only within part of the indemnity limits, (which grant as to such lands no other company than the one I represent had ever earned); and that inasmuch as the act of 1863 withheld the even sections from the grant, this withholding is to be construed as a "reservation," in the sense in which that language is used in the act of 1866. The latter act says that "any and all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or other purpose whatever, be and the same are hereby reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands." In other words, because it was reserved from the grant, it is now to be construed, fifteen years after patent, to have been reserved in a different sense than in which this language is used in and limited in this

act by the statement that it must be a reservation for the purpose of aiding in any object of internal improvement, or any other purpose whatever. This strained interpretation is evolved to revoke and invalidate the title to hundreds of thousands of acres of land to which the defendant company has had undisputed possession, and most of which they conveyed to grantees during a period of fifteen to eighteen years. It is a mere juggle of words, too puerile for a great government to make for the purpose of defeating its own conveyance.

The words in the Acts of 1863 and 1866 of limitation are in terms applicable only to such reservations as had *theretofore* been made for specific purposes, and are in meaning applicable only to lands which were "reservations," which theretofore had seggregated certain portions of the public domain, so that they were no longer open for entry or pre-emption, or vested a right in the United States, either for a definite purpose, such as a military reservation, or a definite right in others by prior grant, or by prior conveyance or rights—in other words, vested rights in others, or a definite and declared dedication to a public and specific purpose for the use of the United States Government as, *e. g.*, for Indian lands, parks, forts, or the like, and does not mean, as appellants contend, as though it said, "not granted or to be granted to this railway." This is obvious from the context and purpose and intent of the Act. The word "reserved" is obviously applicable only to such lands as had been theretofore separated from the public domain, so that it was not properly within the power of the Government of the United States, nor equitable and just toward others, to make a grant of such lands. Whatever was not granted of the public domain of the United States by the Act of 1863, was, in a certain sense, reserved from the grant, and yet it remained just as much a part of the public domain thereafter as theretofore. It did not cease to be public property.

Although it seems almost needless to cite cases on so self-

evident a proposition, yet we are not without authority even upon this point. The case of

Clements *vs.* Warner, 24 How., 394,

definitely holds that public lands within the domain of a grant, before selection is made and notwithstanding the withdrawal of the same from entry or sale, remain thereafter, as theretofore, public lands; and the Court, in delivering its opinion, says, that no act of Congress has defined the meaning of the term "reserve," as applied to lands in these various acts, nor determined explicitly when these alternate sections lose their character as reserves. And by its decision it holds that, after the selection was made, the reservation to the remainder ceased to be operative, and it continued as public land.

Indirectly the same question was considered in

Newhall *vs.* Sanger, 92 U. S., 761, and

Doulan *vs.* Carr, 125 U. S., 618,

in which the question arose whether a Mexican title held to be invalid prior to the selection of indemnity lands by a railroad company, but subsequent to the grants, was not such another appropriation of the public lands as excluded it from the operation of the railway grant. At the time of the passage of the act the Mexican title was still in existence, and it was held that the words "otherwise appropriated," in one of the sections of such an act, confine its application to the condition of things at the time when the act was passed or the selection was actually made, and that at that time the land was actually appropriated and had not become part of the public domain by reason of the invalidity of the Mexican title subsequently so declared. But in Ryan *vs.* Railroad Co., 99 U. S., 382, the Newhall case was distinguished and a different rule laid down, inasmuch as the Mexican title had been declared invalid before the selection had been made.

Before our selection was made the Leavenworth, Lawrence & Gulf grant of lands within the district in controversy had been actually forfeited; the road was never constructed

through Allen County, and on July 24, 1876, an act was passed so declaring such lands forfeited, and the grant to that Company never applied to the even sections.

In the case of the

Cedar Rapids Railroad *vs.* Herring, 110 U. S., 27,

the Court held that indemnity lands, even such as are subject to selection, are public lands until the selection is actually made, except such, of course, in which actual vested interests had theretofore been acquired or of which the title of the Government of the United States had been divested.

In the case of

St. Paul Railroad Co. *vs.* Winona Railroad Co., 112 U. S., 720,

the Court held, in substance, that in regard to the "lieu" or indemnity lands there was not even an obligation on the part of the Government to reserve or withhold the same from sale, and denies the right of the company to insist upon such reservation for its use, using the following language (p. 732):

> "The plaintiff in error insists that the map of its line of road was filed in 1859. The court of original jurisdiction finds that, up to the time of the trial in October, 1878, a period of nearly twenty years, no selection of these lands had ever been made by that company or any one for it. Was there a vested right in this company, during all this time, to have not only these lands but all the other odd sections within the twenty-mile limits on each side of the road, await its pleasure? Had the settlers in that populous region no right to buy of the Government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation, and forbidden to cultivation?

"It is true that in some cases the statute requires the land department to withdraw the lands within these secondary limits from market, and in others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections.

"It by no means implies a vested right in said company, inconsistent with the right of the Government to sell, or of any other company to select, which has the same right of selection within those limits. Each company having this right of selection in such case, and having no other right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the lands so selected. The unascertained "float" then becomes a vested right to an identified tract of land."

This language of the Court not only gives a proper definition of what is meant by reservation from sale of the sections not disposed of within the primary and secondary limits, but also defines the meaning of such reservation; holding that it creates no vested right in any body, and that it leaves the domain public property thereafter, as it was theretofore, and that the words "theretofore reserved for specific purposes" as excluding such lands from the grant arise from an entirely different meaning of the word reservation; in other words, they mean that kind of disposition which alienates the property or charges it in the hands of the Government with a specific application for military reservation, park purposes, or by sale which gives vested rights.

It is further claimed that the Act of 1866 shall be held to mean that all even sections are reserved in the indemnity lands, for the illogical and wholly inconsequential reasons that the even sections were reserved within the ten-mile limit from the operation of the grant of 1863, and for the

further reason that in Section 2 of the Act of 1866, it is provided:

> "That the sections and parts of sections of land, which, by the aforesaid grant, *shall remain in the United States*, within ten miles on each side of said road, shall not be sold for less than double the minimum price of public lands when sold."

The argument of the attorney-general being that, inasmuch as there seems to have been a kind of policy to give for purposes of public improvements, odd sections, only odd sections could be selected for indemnity lands, although no such limitation is to be found in the Act; and that solely upon the ground that by some process of construction or reasoning the limitation imposed upon the direct grant in the ten-mile limits by the Act of 1863, is supposed to over-lap the indemnity lands, and secondly, that this provision imposes upon the Government a kind of a contractual obligation to sell to settlers.. Such a contention would have been entitled to but scant respect by the Land Office as against the issuance of patents for the even numbered sections, and it is entitled to no respect to invalidate patents of long standing. There is no limitation whatever as to the numbering of the sections within the indemnity grant, and all the public lands are indemnity lands within the indemnity limits.

The words last above quoted show that there is no reservation in this part of the Act, in any limiting sense of the word, except the reservation which every grantor makes when he conveys only a part of the domain which he has. He reserves the rest to himself to dispose of as he may see fit. This kind of reservation is the very opposite of what is meant in that part of the law which speaks of land specifically *reserved*, or sold, or otherwise appropriated. In that connection it means lands which do not any longer belong to the United States as a part of the

public domain, but which have been either sold or reserved as a military or other kind of "reservation." The words "or otherwise appropriated" further indicate what is meant by those words, and are a further proof that Congress meant to withhold only such as were appropriated to a definite object by sale, by a military reservation, or by a withdrawal wholly from market, or for purposes of a public park. In no sense is the land of the Government of the United States appropriated, because in the Act which confers the grant, the Government of the United States passed a general law modifying its general homestead laws, fixing the price of specific lands at a higher or other rate than for other parts of its public domain. This general law makes neither an appropriation, nor a sale, nor a reservation of these lands, buton the contrary simply changes the rule of sale for the time being, and creates neither a contract, express or implied, of the Government of the United States to maintain that changed condition for any length of time. It might have been changed the very next day, and the price put at the lower minimum rate, or changed to a still higher rate without injuring or affecting anybody in any such way that he could have a standing in a court of justice to complain of it.

What the Congress of the United States means by the language usually employed in these acts granting lands to railroad companies, of what it reserves from the grant, has frequently been considered by this Court.

The case of Leavenworth, Lawrence & Gulf R.R. *vs.* United States, 92 U. S., 733, is first limited as to its scope in

> Winona & St. Peter R.R. *vs.* Barney, 113 U. S., 618,

in which the Court uses this language (627):

> "The language in *Leavenworth, Lawrence, &c., Rail-*
> "*road Co.* vs. *United States*, 92 U. S., 733, is quoted
> "as sanctioning the position of the appellant. The

"Court, speaking of the indemnity clause in the grant "then under consideration, said its purpose was to "give sections beyond the limit designated for those "lost within it by the action of the Government "between the date of the grant and the location of the "road. But it did not say that this was its only pur- "pose; and, if the language must be construed as "meaning that, it was a mere dictum, not essential to "the decision of the case. The question was, what "lands could be taken for indemnity, not for what "deficiencies indemnity could be had. And it was "held that an Indian reservation did not pass by the "grant, and could not be taken as indemnity for the "lands otherwise lost from it. There was no question "before the Court for what deficiencies indemnity "could be supplied."

In that particular case, the question under consideration was to what land the indemnity was applicable, whether it was intended to apply to such lands, to which the Government could not at that time give title, within the limit of the lands specifically granted. It brought under consideration the whole purpose and scope of these land grants to railroads. The Court said (page 625) that the purpose of these grants to the State was to aid the construction of railroads which were to be built through large districts of country sparsely settled, and though the termini of each were designated, it was impossible in advance of survey to designate the specific route of any one even approximately. Sales of land had already been made by the United States and pre-emption rights of settlers had attached. Before the survey would be made more sales would probably be made and other rights would attach. It was not for the interest of the Government that any portion of the public lands should be withheld from sale and settlement because when the route of the roads were definitely determined they might fall within the limits of the grants; nor

was it the purpose of Congress to lessen the amount directly granted to the railways because of such settlement. The Court continuing, said (p. 625):

> "The policy of the Government was to to keep the "public lands open at all times to sale and pre-emp- "tion, and thus encourage the settlement of the coun- "try, and, at the same time, to advance such settle- "ment by liberal donations to aid in the construction "of railways. The Acts of Congress, in effect said: "We give to the State certain lands to aid in the con- "struction of railways lying along their respective "routes, provided they are not already disposed of, or "the rights of settlers under the laws of the United "States have not already attached to them, or they may "not be disposed of or such rights may not have at- "tached when the routes are finally determined. If "at that time it be found that of the lands designated "any have been disposed of, or rights of settlers have "attached to them, other equivalent lands may be se- "lected in their place, within certain prescribed "limits."

This is the interpretation by the Court of the reservation clause, which is inserted in almost all these acts.

In answer to a suggestion which probably fell from the lips of counsel in that case, that if there was simply reserved what the Government had already disposed of it made the limitation comparatively meaningless because of course the Government could not dispose of lands that had already been disposed of, the Court says (p. 626.)

> "It is to no purpose to say, against this construc- "tion, that the Government could not grant what it did "not own, and, therefore, could not have intended "that its language should apply to lands which it had

"disposed of. As already said, the whole act must be "read to reach the intention of the lawmaker. It "uses, indeed, words of grant, words which purport "to convey what the grantor owns, and, of course, "cannot operate upon lands with which the grantor "had parted, and, therefore, when it afterwards pro- "vides for indemnity for lost portions of the lands "'granted as aforesaid,' it means of the lands pur- "porting to be covered by those terms."

The Leavenworth case (92 U. S., 733) was again limited to the actual point decided, and nothing more, in the case of

Wisconsin R.R. *vs.* Price Co., 133 U. S., 496,

which holds that the Leavenworth case (92 U.S.,733) had been misunderstood by the Land Department in refusing to give indemnity for lands which had been sold by prior sales and other dispositions within the ten-mile limit before the date of the act, and that for such lands there could be no selections made within the indemnity limits.

The Court said (p. 508):

"But that decision did not warrant the change. "The question in that case was not, for what de- "ficiencies indemnity could be had, but what lands "could be taken for deficiencies which existed. If "what was then said indicated that deficiencies which "could be supplied were limited to such as might "arise after the passage of the act, it was a mere dic- "tum not essential to the decision, and, therefore, not "authoritative and binding. The refusal of the Land "Department, therefore, to allow the deficiencies "arising in the sections within the place-limits in this "case to be supplied by selections from the indemnity "lands, and to issue patents of the United States for "them, was erroneous."

The very acts of 1863, 1864 and 1866, making to the

defendant company the land grant in question, were under consideration and construed by this Court in the case of

Missouri, Kansas & Texas Ry. Co. *vs.* Kansas Pacific Ry. Co., 97 U. S., 497.

The Court, in its opinion (p. 497), says:

> "As to the intent of Congress in the grant to the "plaintiff there can be no reasonable doubt. It was "to aid in the construction of the road by a gift of "lands along its route, without reservation of rights, "except such as were specifically mentioned, the loca- "tion of the route being left within certain general "limits to the action of the plaintiff. When the "location was made and the sections granted ascer- "tained, the title of the plaintiff took effect by relation "as of the date of the act, except as to the reservations "mentioned";

What the character of lands was, which remained in the Government, is stated in the opinion further on, in these words (p. 498):

> "The grant made was in the nature of a float, "and the reservations excluded only specific "tracts to which certain interests had attached "before the grant had become definite, or which "had been specially withheld from sale for pub "lic uses, and tracts having a peculiar character, "such as swamp lands, or mineral lands, the sale of "which was then against the general policy of the "Government. It was not within its language or pur- "pose to except from its operation any portion of the "designated lands for the purpose of aiding in the "construction of other roads."

In other words, this language answers the claim put forth by the Attorney-General that the existence of a grant within a certain specified limit reserves the whole. The Supreme Court of the United States says that it does not.

It is upon this principle that the Missouri, Kansas & Texas Railway Company lost its case. It therein made this contention, with more show of justice than that made herein by the Attorney-General, that it was not within the power of Congress to appropriate lands within the domain which had been appropriated to the Missouri, Kansas & Texas Railway Company prior to the selection of the lands by the Kansas Pacific Railway Company, and lost in that contention.

In the case of United States *vs.* McLaughlin, 127 U. S., 428;

it was claimed that the existence of a Mexican grant (illy defined) and to be located in a part of the State of California, was such a reservation as to exclude it from the action of Congress, and was such a reservation as prevents a title from passing from the Government of the United States to the railway company.

The Court disposed of the contention in that case by holding (page 451):

> "If a reservation of an entire territory is to be implied from a floating grant of a quantity within it, "then, logically, every float, or land warrant issued "by the Government, should, until actually located, "operate as a reservation of the entire body of public "lands.
>
> "We can well understand that Indian reservations, "and reservations for military and other public purposes of the Government, should be considered as "absolutely reserved, and withdrawn from that portion of the public lands which are disposable to purchasers and settlers—for, in those cases, the use to "which they are devoted, and for which they are "deemed to be reserved, extends to every foot of the "reservation. The same reason applies to Mexican "grants of specific tracts, such as a grant for all the

"land within certain definite boundaries named, or all
"the land comprised in a certain rancho or estate.
"But this reason does not apply to grants of a certain
"quantity of land within a territory named or de-
"scribed, containing a much larger area than the
"amount granted, and where, as in the present case,
"the right of location within the larger territory is in
"the Government, and not in the grantee."

The argument made by the appellant that there is a contractual relation on the part of the United States with the Missouri, Kansas & Texas Railway Company, or the Leavenworth, Lawrence and Gulf Railroad Company to sell those lands at public sale, and not to make any other disposition of them, is answered, first, by the fact that they and not the United States should be heard to complain and secondly, most fully by the cases of

Frisbie *vs.* Whitney, 9 Wall., 187;
Yosemite Valley case, 15 Wall., 77.

These cases in substance hold, that there is no contractual relation between the United States and persons who purpose, intend, or actually settle upon the public domain in the expectation of acquiring title thereto, until either the payment has been made to the Receiver of the Land Office which equitably transfers the title of the Government of the United States—because the rest is mere machinery to obtain the patent—or until the claimant has made all the necessary steps up to payment, and the payment is refused by the Government of the United States, or delayed by its own action. In other words, there must be a vested right, and not an expectation. That right is vested, not by making the preliminary steps by which the title may ultimately become vested, but by taking the final steps which divests the Government of the United States of its property. Of course, the claim of title is not to be defeated because the Government of the United States has arbitrarily refused to allow itself to be divested

after all the preliminary steps are taken. In this case all that was done by the Government of the United States upon which any pretense can be made that these lands by being held out at a certain price for settlers, are "reserved" for these settlers, is a provision by which the general law was changed by this law, as to price, and as to conditions of sale. An Act of the United States Congress passed the very day following the Act of July 26th, 1866, changing the terms of this provision and subjecting it to the general provisions of the law, would have been perfectly constitutional, and against its provisions no one in a judicial sense would have had any reason to complain.

The cases

Bailey *vs.* Magwire, 22 Wall., 215, and

Salt Company *vs.* East Saginaw, 13 Wall., 373,

clearly discriminate between what may and may not be considered contractual relations between the Government and its people (whether corporate or individual), and fully and completely answer the suggestion that the Government by stipulating in an Act the price at which it will sell its own land thereby entered into a contractual relation as to the public domain, with the corporations with which it was dealing, that it would not make any other disposition of it. No right was vested thereby. After the Acts of 1863 and 1866 the land not thereby granted within the twenty miles of the road, continued as theretofore, to be public land of the United States, subject to be dealt with by the Congress of the United States as it saw fit,—to give away for military purposes, to reserve for park purposes or to make donations of it, indeed to make any other disposition of it that it might see fit. It had the absolute title to these lands, and over them had absolute dominion. The amount at which it was willing to sell, and the manner in which it was willing to sell, could be changed at its own volition. To say otherwise, would be absolutely to prevent the Government of the United States from this day forward, without a single effort being made

on the part of any individual to acquire any of the public domain under the existing law, from thereafter changing in any particular the form of the acquisition of the public lands, or the price which is to be paid for them, and to exclude the Government of the United States from making any disposition of its public lands other than by sale. Such a proposition is so monstrous and absurd upon its face, that it needs but to be stated for the purpose of suggesting its own answer. The Government of the United States can hereafter, as it has heretofore, make whatever regulations it sees fit with reference to such of its lands, with the title of which it has not parted, or with reference to which it has not already entered into such contractual relations of so positive and definite a character, that a court of equity would enforce specific performance if the contract were between private individuals. An offer not acted upon is not a contract. It is no more a contract, because the Government makes an offer, than because a private individual makes the offer. All that the statutes of the United States and this statute can be construed to mean with reference to the public domain is, that for the time being, and until the sovereign who owns the property changes its mind, these lands may be purchased when all steps have been taken in conformity with law by settlers at a certain price. There is no settler who claims that he made a settlement before the act of 1866 was passed, and the Government of the United States cannot claim it, because it changed its mind, and cannot now claim, to our detriment, that it was not within its power to change it.

A different question would arise if an action of ejectment were brought, or a suit in equity by a settler against our client, to declare the Missouri, Kansas & Texas Railway Co., trustee for the claimants, such settler or pre-emptor having actually complied prior to 1866 with all the requirements of law and before the Government made other disposition of this property, and had thereby already acquired a vested title; but there is no such person before this Court.

It is our own grantor who claims it was not competent for it to change its own mind with reference to the disposition of the property which we acquired from it for a full consideration, and who makes this claim twenty years after the consideration was paid by us.

The case of

Kansas City R.R. Co. *vs.* Attorney-General, 118 U. S., 682,

disposes, in our opinion, fully of the only point made in this case, which may be said to be novel, if that question might have been presented for consideration in that litigation. It was an action instituted by the Government of the United States against our privy and assignee, the Kansas City, Lawrence & South Kansas R.R. Co., and brought under consideration all these acts and their bearings. The same counsel, Mr. Lawrence, represented the private interests in that case as in this, and it is a well-settled principle of law that everything touching the subject-matter, which might have been raised in a litigation is considered as much within the spirit of its adjudication as those which were raised. In other words, a litigant as to the same subject-matter is not permitted, after he has been defeated in a court of justice, whenever he thinks of a new point thereafter to start a new case, after he has once had his day in court on the merits.

Cromwell *vs.* County of Sac, 4 Otto, 351.
Emory *vs.* Williams, 2 Wash., 510.
Radford *vs.* Folsom, 3 Fed. Rep., 199.
Price *vs.* Dewey, 6 Saw., 493, S. C.; 11 Fed. Rep., 104.
United States *vs.* Tellow, 2 Lowell, 159.
United States *vs.* Flint, 4 Sawyer, 42.
Fendall *vs.* United States, 14 Ct. of Claims, 247.
United States *vs.* White, 17 Fed. Rep., 561.
United States *vs.* Colgate, 21 Fed. Rep., 318.
United States *vs.* Union Nat'l Bank, 10 Ben., 408.

So also the Government is not exempt from the fundamental rule, that he who asks equity must do equity.

Brent *vs.* The Bank of Washington, 10 Pet., 596, 615.

United States *vs.* Flint, 4 Sawy., 42.

And in the original (Brewster) case (118 U. S. 695) this Court says as to this grant,

"And lastly, while we are not disposed to hold the action "of the officers of the Land Department of the government "as absolutely conclusive upon such a subject as this, we see "no reason why their deliberate action, with careful attention, "and all the means of ascertaining what was right, should be "set aside in this case."

Maxwell Land Grant Case, 121 U. S., 325; and

Colorado Coal and Iron Co. *vs.* U. S., 123 U. S., 307;

U. S. *vs.* Throckmorton, 98 U. S., 61;

for the recognition of the principle by the United States Supreme Court, that the United States Government cannot set aside its solemn deed by patent of property conveyed by it, nor will the courts aid them in so setting it aside, unless some gross fraud, or such a mistake as would cause as between private individuals a like instrument to be set aside, has been committed by the contracting parties; in other words, that the Government of the United States is held to the same principles of good faith and honest dealing in accepting either the consideration of the building of the railway or the pecuniary consideration of the payment of money to it, that any private litigant is subjected to. If that be the true and the proper rule, let us subject this case to an examination for a moment to see what would become of it in a court of justice if a private individual were to present to a court of justice the grounds upon which these patents are sought to be set aside.

John Smith, having a vast property in one of the remote Territories, says to a number of individuals, "organize yourselves into a corporation and build a railway to, through and from my property to a market, and I will give you 10,000 acres out of the 100,000 that I own in that vicinity." The railway is built. The 10,000 acres are conveyed by metes and bounds. At the time of the conveyance Smith owns all the property he intended to convey, and knows precisely the scope and effect of his conveyance. Fifteen years after this property has been sold by the railway company to numberless people, after the railway has been operated for a period of twenty years, and all the consideration that could possibly pass was paid to Smith, and after all his surrounding property has been doubled and trebled in value, he comes into a court of justice and says, "I desire to have my conveyance set aside, not only as against the original grantee, but as again all the grantees under and from it, for the reason that at the time I made the conveyance I was under a moral obligation to keep a promise I had made some time before to convey that property to some one else. It is true that the obligation did not amount to a contract; that the party to whom I think I owe this obligation makes no claim to enforce it; that he can never legally enforce it. It is true that I have received the consideration for the conveyances I made to the defendant, and I do not propose to return it, but I feel my conscience moved at the end of fifteen years as to this conveyance, and I desire, without giving back one penny of the consideration upon the basis of which I received this railway through my lands and had all the neighboring property improve in value, to have the conveyance set aside by a Court of Equity."

Such a claim and such a proposition would be regarded as almost insane if presented to a court of justice, and such a suitor should be ejected from a court without being treated to the dignity of an opinion.

In conclusion, I desire to draw the attention of the Court

to the opinion of Mr. Miller, the present Attorney-General, when asked to commence a litigation of a similar nature to the one attempted here, but which in its effect would not have worked nearly so gross an injustice as that which is sought to be accomplished in this case, and which is printed in the appendix to our brief, page 67. In declining to commence the action suggested to the Attorney-General by the Secretary of the Interior against the Atlantic & Pacific R. R. Co. on analagous grounds to those upon which this action is based, the Attorney-General says:

> "It appears that the lands are almost altogether in the hands of *bona fide* purchasers without notice. We could not recover from them. It would seem to me unjust to attempt it. In addition to this, and as a cumulative reason, I cannot refrain from saying that I have a very great hesitation in attacking patents which have been standing for any considerable length of time. In this case, even if there were original error (and I think there was not), no individual has been injured, and the theoretical injury to the general public is a much more tolerable calamity than would be the actual undeniable hardship of a threatening suit, which would cast some degree of discredit on these titles and cripple business and dealings on the faith of them. I do not think the local agitation for the cancellation of these certificates has good legal grounds; it does not present doubtful legal questions to be solved. I do not think we should be justified in discrediting due and formal titles from the Government in order to set at rest some unwarranted doubts in the minds of individuals who are no further injured than that they lose a hoped-for privilege of homestead entry on the lands in question. The injury to them is that they find it impossible to acquire a right they might have if we should cancel the certifications. It seems to me that vested rights have the priority. My conclusion therefore is, that the suit should not be attempted, and I am further

strengthened in this view by the uniform expression of the Supreme Court within the last four years intended to discourage all actions of the Government attacking its own patents, these expressions are unequivocal, and would be a cause for hesitation were not the other reasons conclusive."

I desire to draw the attention of the Court to the principle of law clearly established in a long series of decisions, that when the United States voluntarily becomes a suitor in a Court of Chancery it stands upon the same footing qua suitor as a private individual. This is especially the rule when the United States is a party to a suit in equity, in one of the Courts of the United States, and in such a case the proposition for which we contend is settled law.

Fink *vs.* O'Neill, 106 U. S., 272.

In the case of

Leavenworth, &c., R.R. Co. *vs.* U. S., 92 U. S., 759, 760,

which held that this very railway company was not entitled to indemnity lands from the Osage Indian Lands after the title was acquired by the United States, Mr. Justice Field, dissenting, says:

"The conclusion reached by the court appears to me to work great injustice. The government of the United States, through one set of its officers, after mature deliberation and argument of counsel, has issued its certificates or lists, that the lands in controversy were covered by the grant, and has thus encouraged the expenditure of millions of money in the construction of a public highway by which the wilderness has been opened to civilization and settlement, and then on the other hand, after the work has been done and the money expended, has, with another set of officers and all the machinery of the judiciary, attempted to render and has succeeded in rendering utterly worthless the titles

> it aided to create and put forth upon the world. Such proceedings are not calculated, in my judgment, to enhance our ideas of the wisdom with which the law is administered, or of the justice of the Government."

In that case no patents had actually been issued, and the strictures of Justice Field were directed against the injustice done to the railway company to disappoint, through the machinery of the courts, the reasonable expectations for patent which had been raised by the action of the Department of the Interior. In this case the effort is made, from thirteen to eighteen years after patents have been duly issued and granted after elaborate arguments before the Interior Department with reference to the granting of the patents, after every step had been taken by the railway company and every consideration paid by it which caused it to obtain these patents for many thousands of acres of land, to annul the same by the judicial machinery of the government without the suggestion of a mistake which would vitiate a contract between private individuals, or even the suggestion of a fraud by the vendee, which would in any part of the world cut down a contract. The case, as presented by the United States, is utterly without merit, and the judgment of the Circuit Court sustaining the demurrer should be affirmed.

Respectfully submitted,

SIMON STERNE,

Of Counsel for the Missouri, Kansas & Texas Railway Company, Appellee.

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No. 733.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER, 1890.

THE UNITED STATES, *Appellant*,
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY ET AL., *Appellees*.

No. 733.

Appeal from the Circuit Court of the United States for Kansas.

ARGUMENT OF A. L. WILLIAMS.

KANSAS PUBLISHING HOUSE, TOPEKA.

The case is in all essential features the same as the suit of the *Attorney General vs. The Kansas City, Lawrence & South Kansas Railroad Company*, decided by this court in October term, 1886, and reported in 118 U.S. 682. So nearly identical are the cases that His Honor, Judge BREWER, who decided the case last mentioned in favor of the United States, decided this case against the United States on the strength of that, and the only difference perceptible is that in this case the indemnity lands were selected from even-numbered sections along the line of the grant instead of odd as in the other; and that in this case it is averred that the lands in controversy are included within the New York Indian Reservation, and were therefore not subject to grant.

The bill first recites the act of March 3, 1863, (12 Statutes at Large, 772,) which granted lands to the State of Kansas to aid in the construction of roads, as follows:

"That there be, and is hereby, granted to the State of Kansas for the purpose of aiding in the construction: First, of a railroad and telegraph line from the city of Leavenworth, by the way of the town of Lawrence, and via the Ohio City crossing of the Osage river, to the southern line of the State, in the direction of Galveston Bay, in Texas, with a branch from Lawrence, by the valley of the Wakarusa river, to the point on the Atchison, Topeka & Santa Fe Railroad where said road intersects the Neosho river.

"*Second:* Of a railroad from the city of Atchison via Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Santa Fé, New Mexico, with a branch from where this last-named road crosses the Neosho, down said Neosho valley to the point where the said first-named road enters the said Neosho valley, every alternate section of land designated by odd numbers for ten sections in width on each side of said road, and each of its branches. But in case it shall appear that the United States have, when the lines of route of said road and branches are definitely fixed, sold any section or part thereof, granted as aforesaid, ... then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purpose aforesaid, from the public lands of the United States nearest to

tiers of sections above specified, so much land, in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated: *Provided*, That the land to be so selected shall in no case be located further than twenty miles from the lines of said road and branches."

It next recites the act of July 26, 1886, (14 Statutes at Large, 289,) which makes a grant direct to the appellee.

Its next recital is, that the appellee attempted and pretended to take an assignment of all the rights, privileges and grants of the Atchison, Topeka & Santa Fe Railroad Company under the act of Congress of March 3, 1863, so far as the said act of Congress applied to the branch road from the point where the Atchison, Topeka & Santa Fe Railroad crosses the Neosho river, and down said Neosho valley to a point where the Leavenworth, Lawrence & Galveston Railroad enters the said Neosho valley; and that on the 9th day of February, 1864, the State of Kansas by an act of its Legislature accepted the grants provided for in the act of Congress of March 3, 1863, upon the terms and conditions mentioned in said act of Congress; and that subsequently, to wit, on the 26th day of February, 1867, said Legislature pretended and attempted to concur in and ratify the aforesaid deed of assignment from the Atchison, Topeka & Santa Fe Railroad Company by a resolution regularly passed and adopted.

Following this, the bill avers that after the assignment last mentioned, the appellee filed with the Secretary of the Interior its map of definite location, which was accepted by the Secretary on the 19th of February, 1867, and with the map filed a statement claiming all the lands granted by the act of Congress to the State of Kansas on the 3d of March, 1863, and July 1, 1864, by reason of the aforesaid assignment, and also claiming all the lands under the grant of

1866. This assignment, the bill avers, was void because the railroad companies had no power to make it, and because it "was not ratified or confirmed by the Legislature of the State of Kansas in a legal or valid manner, in this, to wit, that said assignment was pretended and attempted to be ratified and concurred in by joint resolution of said Legislature, when in law and fact such ratification and concurrence could only be had by an act of said Legislature regularly passed and enacted."

The bill also avers that the State of Kansas never accepted the grant of July 1, 1864, and consequently that no grant passed, and that the Secretary of the Interior and the President in causing patents to be issued for such lands "acted under the mistaken belief that the said act of July 1, 1864, had been accepted by said State and was duly in force as applied to said lands."

The next averment is that a small part of the line was constructed "on an average of two miles from the line marked on its map of definite location filed in the office of the Secretary of the Interior."

The next averment is that before the final selection of these indemnity lands, a large number of settlers went upon them and claimed to hold them as settlers, but without being permitted to enter the same, by reason of the fact that the commissioner of the General Land Office on the 19th day of March, 1867, "unlawfully" addressed a letter to the Register and Receiver of the local land office at Humboldt, directing all such lands to be reserved from sale, location or entry of any kind.

It is further averred that the appellee has sold or agreed to sell to sundry and various persons, all the lands in suit, and that the various co-defendants of the appellee are now claiming such land in fee or under such agreement to sell,

but with notice of the rights of the United States and the claimants under the homestead and preëmption laws.

The next averment, and the only material one in the bill, is, that the appellee has received under its various agreements, including the lands in the suit, 796,924 acres of land, which the bill avers is 252,922 acres more than it is entitled to, by reason of the fact that it has constructed but 85 miles of road for which it is entitled to lands under the grants; and in support of this averment it recites the act incorporating the Union Pacific, and says that the appellee's road is constructed for twenty miles through the grant of that company; for twenty miles through the grant of the Atchison, Topeka & Santa Fe, and for twenty-nine miles through the Osage Indian Reservation, and that it is entitled to no land grant below the town of Parsons, in Labette county, a distance of 157 miles from the northern terminus of the road. The total length of road is averred to be 175 miles, though in fact it is 189, as shown in a former case in this court. It assumes in this paragraph that but 157 miles of road at most have been constructed under land grants, and that for the twenty miles constructed through the Kansas Pacific land grant, the twenty miles through the Atchison, Topeka & Santa Fe land grant, and twenty-nine miles through the Osage ceded lands, it is entitled neither to a land grant nor to indemnity lands in lieu of lands lost, by reason of the fact that these lands have been previously appropriated and reserved for other purposes.

Its next averment is, that these lands were all included within the New York Indian Reservation, ceded to that nation by the treaty of January 15, 1838, and that such reservation has never been extinguished by any law or treaty, or judicial forfeiture, or in any other manner whatever abrogated or set aside. It adds that on the 21st of August,

1860, a proclamation providing for the sale of said lands was duly signed by the then President of the United States; that in conformity with the terms of such proclamation said New York Indian lands were offered for sale, but that no other steps were ever taken to extinguish the Indian title until the year 1868, when a treaty was made for the surrender of the lands in controversy, which treaty was never ratified by the United States Senate; and in conclusion it prays for a decree adjudging the legal title to all the lands described in Exhibit "B," and contained in the patents shown in Exhibit "D" to be in the United States, and that the appellee bring into court its patents for cancellation.

HISTORICAL.

Perhaps a brief statement of the history of the land grant involved in this case will enable the court to see the question more readily than by inspection of a long and technical bill.

In 1863, Congress made a grant of odd-numbered sections to the State of Kansas to aid in the construction of a railroad from Emporia, down the Neosho river to the point where this river is crossed by the Leavenworth, Lawrence & Galveston road. Other provisions were made for another road, but they are not material to the consideration of this question. In 1864, Kansas accepted the grant and clothed the Atchison, Topeka & Santa Fe road (an existing corporation of this State) with the power to construct this branch southward from Emporia, and to receive the land grant therefor. At the same time it asked Congress to make a land grant for the building of a branch from Emporia northward to Ft. Riley, on the Union Pacific Railroad, agreeing that if Congress should make such grant, that it should inure to the benefit of the Atchison, Topeka & Santa Fe road. Consequently, in 1864 Congress did pass an act as re-

quested, extending the land grants to a branch to be built from Emporia to Ft. Riley. Shortly after this grant, the Atchison, Topeka & Santa Fe road assigned its right to build both branches, that is, the branch north and south of Emporia, to the Union Pacific Railway Company, Southern Division, since called the Missouri, Kansas & Texas. This assignment, which was dated March 19, 1866, was ratified by the Legislature of Kansas by a joint resolution February 26, 1867. After this assignment, to wit, July 26, 1866, Congress made a grant direct of five alternate sections per mile of odd-numbered sections to aid in the construction of the Missouri, Kansas & Texas by name, from Ft. Riley to the south line of the State, having in view, as the act stated, the extension of the road through the Indian Territory to Ft. Smith, Arkansas. As the right of this road to construct its line was confined by its charter to the limits of Kansas, the United States, by section 8 of this act, conferred corporate power upon the company to extend its road through the Indian Territory, and in terms provided,—a thing never before done so far as I can find out,—for the same grant of land through the Indian Territory whenever the title thereto was extinguished, as it had through the State of Kansas. In pursuance of the various acts, the Missouri, Kansas & Texas constructed its road from a point on the Union Pacific near Ft. Riley, to the south line of the State and through the Indian Territory to Denison, Texas, and claimed its land grant by virtue of the acts of Congress of 1863, 1864, and 1866. The road, by a subsequent arrangement, was extended from Hannibal, in the State of Missouri, to Parsons, in the State of Kansas, and was constructed to the latter point before the line down the Neosho had reached Parsons, being 157 miles from its northern terminus.

By reason of its constructing its road there have been cer-

tified and patented to the company, according to the bill, 796,929 acres of land, which it is claimed is an excess of 252,929 acres, by reason of the fact that but eighty-five miles of the road carried with it any land grant; and this presents the only question there is in the case, except the allegation that the particular lands in suit are within the limits of the New York Indian Reservation, as defined by the treaty with that tribe of Indians, better known as the Six Nations, of January 15, 1838.

NEW YORK INDIAN LANDS.

The New York Indian Reservation matter was discussed at length in the *Kansas City, Lawrence & South Kansas Railroad Company* case. (Page 682, volume 118, U. S. Reports.) The sixth proposition of the brief of Mr. Lawrence in that case, was as follows:

"It is submitted that the lands in controversy are not subject to any land grant, because included in the New York Indian Reservation, under treaty of January 15, 1838, never legally revoked."

And in support of this proposition, an immense number of authorities (which could not possibly be in point, and which were only useful in showing the conceded industry of that distinguished gentleman,) were cited. The court disposed of that and a good many other questions, with the statement that they were not important enough to require further discussion. In view of the fact, however, that this bill contains a distinct allegation on the subject which was wanting in the bill in the original case, it is deemed advisable, out of extreme caution, to call the attention of the court briefly to the status of the New York Indian Reservation.

The Indians known as the New York Indians, were originally largely the Senecas, but after a while, through combinations with other tribes, became what has since been generally

known as "The Six Nations." Early in the administration of President Monroe, attempts were made to provide for their removal from the State of New York, and on the 27th of October, 1832, a treaty was made between the United States and the Menominee Indians, by which the latter tribe ceded to the United States, for the use of the New York Indians, 500,000 acres of their lands, situated in the State of Wisconsin, in lieu of a large portion of their lands in New York, there being a condition attached to this cession to the effect that the New York Indians should remove to their Wisconsin land within three years from the date of the treaty. The New York Indians, however, showed no disposition to avail themselves of the treaty, and did not, in fact, remove to their new reservation. Thereupon, a new treaty was made with the Six Nations, on the 15th day of January, 1838. (Statutes at large, vol. 7, page 550.) In this treaty, the Indians stated that they had become satisfied, from the rapid increase of white settlements around them, that removal was necessary, and that their true interests required them to remove to the far West. They therefore asked the President to take their Wisconsin land, and provide them a new home among their brethren in the Indian Territory. This treaty set apart for them a large body of land in the State of Kansas, covering the lands in suit. In exact numbers, there were 1,824,000 acres of land situated within the limits of the present State of Kansas, set apart for their exclusive use, at the rate of 320 acres for each member of the tribe, computing a population of 5,700, though the actual count gave only 5,485. This land was to be held in fee simple by the TRIBES, or NATIONS of Indians, with full power to divide the same among the different TRIBES, NA-

TIONS, or BANDS, having the benefit of the act. It was provided, however, in section 3:

"That such of the TRIBES of New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other times as the President may from time to time appoint, shall forfeit all interest in the lands so set apart to the United States."

It is not averred in the bill, nor is it true in fact, that the President in any wise ever modified that condition; nor is it alleged in the bill that any removal of the TRIBES or NATIONS, or any members of the tribes or nations, ever took place in pursuance of that treaty. It is true (*dehors* the record) that a few individual New York Indians did remove to the Territory and were allotted lands, which they subsequently abandoned. It is not claimed that any of the lands in suit are identical with the few allotments referred to.

On the 5th of November, 1857, another treaty was made with the Tonawanda band of Senecas, (one of the Six Nations,) by which that band relinquished all claims to the lands west of the Missouri river.

On the 21st day of August, 1860, the President of the United States issued his proclamation No. 667, ordering the sale of the New York Indian reservation lands at public sale; and in pursuance of that proclamation the lands were sold, and for a great many years have contained a large population composed of the families of men who bought from the Government, on the faith of its title, long prior to the date of the grant to the Missouri, Kansas & Texas. It would seem that this conclusively settled the proposition that these lands are not included within the limits of a reservation which had not been extinguished at the date of the grant to this company. The treaty provided in express terms that the Indians were to remove to the new homes within five years, and to surrender their lands in New York and Wisconsin. They

did neither. It is true that it was to be within five years, or such other time as the President might from time to time proclaim. This was manifestly a limitation upon the time, unless the President by proclamation should enlarge it. His failure to take any action in the matter raises a conclusive presumption that no extension of time was contemplated. Even, however, if this were not so, a subsequent proclamation ordering the land to be sold as the public lands of the United States was equivalent to a declaration, which he was empowered to make, that the terms of the treaty had not been complied with upon the part of the Indians, and were not therefore binding upon the United States. Moreover, the identical lands in suit in the case of *Attorney General vs. The Kansas City, Lawrence & South Kansas* were also embraced within this so-called reservation, and if the selection of lands from the even-numbered sections was void for that reason, so were the selections of odd numbers. This matter, then, should be considered put at rest by the decision of the court in that case, that the Missouri, Kansas & Texas took title to the lands then in suit, and had power to convey them to the defendant company, whose title this court affirms.

THE ONLY QUESTIONS PRESENTED HERE — AND THEY SEEM TO HAVE BEEN CONCLUSIVELY SETTLED IN THE FORMER CASE — ARE:

First: HAS THE APPELLEE RECEIVED MORE LANDS THAN IT IS ENTITLED TO?

Second: IF IT HAS, CAN THE COURT UNDER THE TERMS OF THE BILL SELECT THOSE IN SUIT FOR CANCELLATION RATHER THAN OTHER LANDS CONVEYED TO THE COMPANY?

This case proceeded all the time upon the theory advanced in the case in 118 United States. It was asserted in this case, as in that, that three distinct grants were made by the

acts of 1863, 1864 and 1866, which were intended to be separate, and to aid in the construction of two distinct lines of railroad from Ft. Riley to an intersection with the Lawrence road, and the claim was made that the first and second grants to the Atchison, Topeka & Santa Fe being independent and distinct from the grant to the Missouri, Kansas & Texas, had withdrawn from grants all lands along the line of the road sought to be aided by the act of 1866. The assignment by the Atchison, Topeka & Santa Fe of its right to construct its branches to the Missouri, Kansas & Texas, was treated as a nullity. This court, however, treated all the grants as if made to one company, and as being all parts of one act, of which the Missouri, Kansas & Texas was the beneficiary. It in terms approved the assignment from the Atchison, Topeka & Santa Fe to the Missouri, Kansas & Texas. In the face of the argument and allegation that such assignment was *ultra vires* and void, and the further fact that this assignment had been ratified by joint resolution and not by act of Legislature, this court held the assignment valid and the ratification good. Against the right of the company to make an assignment under these circumstances, no argument can be urged; and it is sufficient to say that under the Constitution of the State of Kansas, a joint resolution has the same force as a bill or act. Even if this were not so, however, the objection would not be well taken. Courts, in dealing with questions of this kind, look to the substance and not to the form; and the fact being made to appear that both branches of the Legislature and the executive of the State concurred in the act of the Atchison, Topeka & Santa Fe Company in assigning its right should be conclusive.

THE QUESTION IN THIS CASE.

The serious contention is that but 85 miles of road were entitled to land under the various grants, and this it seems is

based upon the claim that the subsidized portion of the road begins at the northern line of the Osage reservation, 125 miles distant from its northern terminus, from which there should be deducted 20 miles of the line running through the Union Pacific land grant and 20 miles running through the Atchison, Topeka & Santa Fe. Upon what theory this claim is made I confess I am unable to see. The first grant, viz., that of 1863, only extended from Emporia to a junction with the Lawrence road, and the grant of 1864 only extended from Emporia to a point at or near Ft. Riley; but the grant of 1866, and the one under which these lands, being even-numbered sections, are claimed as indemnity lands, in terms extended from the northern terminus on the Union Pacific to the south line of the State. This line is, according to the averments of the bill, 175 miles long, though in fact it is about 189 miles. If from this length were deducted 20 miles of the line through the Union Pacific land grant, 20 miles through the Atchison, Topeka & Santa Fe, and 29 miles through the Osage ceded lands, making an aggregate of 69 miles, there would still remain 106 miles of road entitled to the land grant. There is, however, no warrant for saying that the company is not entitled to indemnity for the lands it could not receive within the limits of prior land grants or in the Osage reservation. When Congress passed the enlarged grant it knew that this line of necessity ran through the Union Pacific and the Atchison, Topeka & Santa Fe land grants, a distance of 40 miles; it also knew that it extended through the Osage reservation, a distance of twenty-nine miles. If there had been any intention to limit its grant so as not to extend through these lands otherwise reserved, it would have said so in apt words. That the contrary was intended, would seem manifest upon an examination of the act. In all previous land grants, only the

odd-numbered sections were reserved for indemnity purposes. In this act, indemnity lands could be taken from both odd and even-numbered sections along the line of the road. If the company was not entitled to either grants, or indemnity for lands within the grants referred to, then the odd-numbered sections were abundantly sufficient to indemnify it for all lands previously taken by homestead and preëmption filing. If, on the other hand, it was intended to make a grant of ten sections of land per mile for the entire length of the road, and allow indemnity for lands lost by reason of their previous reservation for other railroads, or Indian tribes, then it became necessary to set apart for purposes of indemnity, all lands within the indemnity limits of the grant; and this was done. To emphasize the intention of Congress to make an adequate grant to this road, it was clothed by Congress itself with the corporate power to extend its lines through the Indian Territory, and by section nine a proviso was made—never before nor since seen, I believe, in any land grant—to the effect that the same grant of lands, as provided in the first section of the act, should be made to the company through the *Indian Territory*, to take effect whenever the Indian title should be extinguished. Now, it would be an odd construction of this grant to say that the Government did not intend to grant indemnity lands to this company for lands it lost by reason of a part of its road running through lands hitherto granted to other railroad companies, and yet did make provision for a grant of land through a territory which the United States did not own, and could not grant until it had extinguished the Indian title.

It will be observed, as I have said, that by the act of 1866, Congress, in addition to a grant of land, conferred a corporate franchise upon this company. The State of Kansas could only authorize the construction of a railroad to its own bor-

ders, and had, as the act of Congress itself recites, attempted nothing further. It was authorized, and could only be authorized, to extend its line to that limit, and Congress took notice of the fact that it was thus built, with the intention of extending it to Ft. Smith, in Arkansas. To enable it to do this, it had to be clothed with corporate power by the Government in which was vested sovereignty over the lands through which it should pass. Without such authority, it could not be built. The recent war had demonstrated the necessity of connecting the various military posts of the country by railroads, and it was specially desirable that two posts so prominent at that time as Ft. Riley and Ft. Smith should be thus connected. In view of this, and for the purpose of promoting the enterprise by a corporate franchise as well as a grant, Congress did, in section 8 of the act, give to this company the corporate authority to extend its road, and this authority was and could be the only corporate character it had, or could have, within the limits of the Indian Territory. The possible suggestion that this was a mere grant of right of way, is negatived by the concluding clause of the section, which in terms grants the right of way, in addition to the corporate franchise, to construct and operate its road. For the information of the court, the section is herewith given:

"SEC. 8. *And be it further enacted*, That the said Pacific Railroad Company, Southern Branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas rivers, to Fort Smith, in the State of Arkansas; and the right-of-way through said Indian Territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary grounds for stations, buildings, work-shops,

machine-shops, switches, side-tracks, turn-tables, and water stations."

It was assumed in argument below that the decision of this court in the Osage Ceded Land case, (92 U. S. 733,) had conclusively settled the fact not only that a railroad took no grant of land through the Osage Reservation, but that it was not entitled to any indemnity by reason of lands not received in that reservation; and a reading of that case would seem to justify that conclusion. In a subsequent case, however, and after more full consideration, this court held in *Winona & St. Paul R. R. Co. vs. Barney et al.*, (113 U. S. page 618,) that such was not the true construction of that decision, or if it was, that the language from which the construction was drawn, was the mere dictum of the court, and not conclusive. In the latter case, the court says that in the Osage Ceded Land case it merely decided that no lands in the Osage Reservation passed by the grant, but do not say that the company is not entitled to indemnity by reason of its failure to get lands in that reservation. It goes without saying, of course, that if by reason of the character of this reservation no lands within it passed to the company, no indemnity land could be selected within that reservation; but it does not follow that indemnity lands could not be obtained in place of those lost within the reservation, and in the course of the decision, this court says very pointedly:

"The question was, what lands could be taken for indemnity, not for what deficiencies indemnity could be had."

And it was held that an Indian reservation did not pass by the grant, and could not be taken as indemnity for the lands otherwise lost through it. There was no question before the court for what deficiencies indemnity could be supplied. In this case there is. The court in that case proceeded to

say that a company to which a grant has been made is entitled to indemnity for lands sold, disposed of, or otherwise reserved by the United States, as well *before* as after the date of the grant; in other words, the company to which a grant is made is entitled to the full number of acres which it would receive under the grant if no lands had been reserved; so that when the company becomes entitled to the lands and its line is definitely fixed, it may have the full amount of lands per mile stipulated for within the granted limits, and outside of that, within the indemnity limits, a sufficient amount to make the full grant in lieu of lands otherwise disposed of, whether such disposition had been made by the Government before it made the grant, or afterward. To apply that doctrine to this case, it would be saying, in substance, that the United States grants to the Missouri, Kansas & Texas Railroad five sections of land in odd-numbered sections on either side of its road, making a total, on the basis of 175 miles of road, of 1,120,000 acres, with an agreement that if, when the road was definitely located, it was found that the Government did not have this amount of land within the granted limits either by reason of a sale or reservation made *prior* or subsequent to the grant, it would, within the indemnity limits, make up the deficiency out of either odd or even-numbered sections of land.

THE INSINUATION THAT THE M. K. & T. NEVER BUILT SOUTH OF PARSONS.

It will probably be claimed that the bill contains an averment that the line of road south of Parsons to the State line was never constructed by the Missouri, Kansas & Texas, and therefore that it is entitled to no indemnity lands. An inspection of the bill will show either a very careless averment, or an attempt to make the court adopt an inference in lieu of an allegation. It will probably be claimed that the aver-

ment is in effect that the Missouri, Kansas & Texas built to the town of Parsons, and no farther, with an added admission that another road was built from Hannibal, Missouri, to the town of Parsons, and to a junction with the Missouri, Kansas & Texas, and thence to the south line of the State, and through the Indian Territory into Texas; and that this latter company was a distinct and separate corporation. If such were the facts, it was easy enough to have averred them; but this the bill does not do. As before said, it simply seeks by an obscure averment, to have the court adopt an implication that such was the fact. The averment is as follows:

"Your orator says that the Missouri, Kansas & Texas Railway Company never constructed any railroad under said acts of March 3, 1863, July 1, 1864, or July 26, 1866, farther south than the town of Parsons, in Labette county, a distance of 157 miles by way of the railroad of said company from its northern terminus, at or near Fort Riley, but the road of said company running in a southerly direction from Parsons to the southern line of the State of Kansas was constructed as part of one main line of road running from Hannibal, on the eastern line of the State of Missouri, in a southwesterly direction through said State of Missouri; thence in the same general direction through the southeastern part of the State of Kansas to the southern line of said State of Kansas; thence in a southerly direction through the Indian Territory to Denison, in the State of Texas; and said main line of said road was constructed under and by virtue of other laws than those acts of Congress aforesaid; and said main line through the State of Missouri and through the State of Kansas was by said company constructed and in operation long prior to the construction of said road from Emporia to Parsons, and as a separate and distinct road, and said road from Parsons northward was a separate road, as a branch of the main line of road from Hannibal, Missouri, to Denison, in Texas; wherefore, said company never was entitled to any indemnity lands."

It will be observed that no attempt is made to give the name of the corporation which it alleges constructed the line of road from Parsons south. It does not aver that it was

not a part of the Missouri, Kansas & Texas, by consolidation, properly enacted by the laws of the different States through which it passed. It does not aver that it was not the Missouri, Kansas & Texas itself, properly authorized by the laws of the State of Missouri to construct that portion of its road which runs through that State. It does admit, on the contrary, that the road in question was the road of the appellee. It says that the road of this company was never constructed —

"farther south than the town of Parsons, in Labette county, a distance of 157 miles, by way of the railroad of this company from its northern terminus at or near Fort Riley; but the road of said company, [*i. e.*, the Missouri, Kansas & Texas company,] running in a southerly direction from Parsons to the southern line of the State of Kansas, was constructed as a part of one main line of road running from Hannibal, on the eastern line of the State of Kansas, in a southerly direction through said State of Missouri."

If this averment means anything beyond an evasion, it is that before the final construction of this road the inexorable laws of commerce had made it necessary that the line be extended eastward as well as south, and that in pursuance of this law the line was extended from Parsons to Hannibal, or Hannibal to Parsons — it is immaterial which — of which in fact, and by reason of the demands of commerce, the original main line from Junction City south became a mere branch. These are matters of daily occurrence in new countries, but the status of the road is to be determined by the acts incorporating it and the laws of the State in which it was situated. It is immaterial in this case whether the Missouri, Kansas & Texas by proper authority built a line from Hannibal to Parsons before its line to which aid was granted by the law of 1866, reached Parsons or not; and it is immaterial which was the main line south of Parsons to the State line, if, as the truth is, it was in fact constructed and in operation as one

continuous line of road from Ft. Riley to the southern line of the State within the time prescribed by Congress. That this is true, is not denied by the bill. In view of the fact that the line of road thus constructed has been in operation nearly twenty years, to the satisfaction of the Government, in compliance with its obligations; that its right to thus construct and operate its road has never been questioned; that these facts were properly ascertained and determined before the lands were certified to the State or patented to the company; that on the 9th day of July, 1870, the chief engineer of the road filed an affidavit showing the completion of the road from Junction City to the south line of the State, accompanied by a map showing the line constructed, and on the 13th day of the same month, the Governor of the State certified to the construction of the road, and on the 25th of the same month, J. D. Cox, then Secretary of the Interior, certified that the road was constructed as required by act of Congress; and in further view of the deliberately misleading character of the averment, it is proper to say that it might well have been omitted from the bill.

CONCLUSION.

Outside of the averment that the company has received more lands than it was entitled to under the grant, and the fact that such lands were within the limits of the New York Reservation, no questions of serious import have been presented, and a brief mention only of these will be made. They are:

First. KANSAS NEVER ACCEPTED THE ACT OF JULY 1, 1864.

Second. THE SECRETARY OF THE INTERIOR AND THE PRESIDENT OF THE UNITED STATES, IN CAUSING PATENTS TO BE ISSUED FOR LANDS, ACTED UNDER A MISTAKE OF LAW.

Third. THAT THE SETTLERS REPRESENTED BY MR. LAW-

RENCE HAVE SUPERIOR RIGHTS TO THE GRANTEES OF THE MISSOURI, KANSAS & TEXAS COMPANY.

In answer to the first proposition, it is sufficient to say that no acceptance by the State of Kansas was necessary to the validity of that act, so far as it made a land grant for a railroad north of Emporia to Fort Riley. Besides, the State of Kansas had invited the act, and accepted it in advance, as will be made apparent by an examination of section three of the act of the Legislature of Kansas in accepting the land grant of Congress of March 3, 1863, in which act it was provided that if Congress should, before the 4th day of March, 1866, consent that the Neosho Valley Branch of the Santa Fe might be extended to Fort Riley, and make a grant of land therefor, such grant should inure to the benefit of that company. This Congress did by the act of July 1, 1864, making reference to the act of 1863 for the terms of the grant.

In answer to the second proposition, it might be sufficient to say that the right to plead ignorance of the law — which is denied to the most ignorant of our citizens — can hardly be invoked without causing a smile, in behalf of the President of the United States and the Secretary of the Interior; and it might also be added, in view of the decision of this court in the Leavenworth case, in 118 U. S., that possibly the President and Secretary were not mistaken in the law, and the gentleman who drafted this bill was.

The third proposition is entitled to no consideration whatever. It proceeds upon the theory that the public lands of the United States belong of right and not of grace to settlers. The Government has the same right to dispose of its lands that an individual has, and may prescribe the terms upon which such lands may be held. When it adopted a policy of granting free homesteads, or selling its lands to

preëmptors, at a nominal price, it had a right to prescribe the rules and regulations by which such homestead and preemption rights could be obtained, and did so. Under those rules, it was not sufficient that a settler had all the qualifications to entitle him to a homestead or preëmption right, but the land which he claimed must be subject to homestead and preëmption; and to entitle him to make his entry, compliance with the rules and regulations prescribed by the department was an essential prerequisite. This being so, an inability to comply with such rules is fatal to the claim of a right to entry, even if this inability had been created by mistake, or unlawful acts of the proper officers of the land department. When the proper officer commands the withdrawal of lands from market, it is the duty of subordinate officers to make such withdrawal and refuse all filings offered thereon, and this duty cannot be evaded, even if the order of withdrawal ought not to have been issued. To hold the contrary would be to assert the destructive doctrine that every receiver, or register of a local land office, was at liberty to disregard the orders of his superior when in his own judgment such orders ought not to have been issued. If, then, the action of the proper authorities at Washington deprives a proposed settler of his right to make a homestead or preemption filing, he must first obtain in some form the reversal of the order complained of, so that the machinery of the land office may be operative to protect and enforce his rights; so, if a local land officer is notified that a given piece of land is not open to preëmption or homestead, such land is, during the continuance of the order, absolutely withdrawn from the public lands whether the order withdrawing them was in fact warranted by law or not.

The alleged settlers (who do not exist except in this bill,) knew this fact; they were, and are, a part of that turbulent

American element which is always fighting for something it is not entitled to, and to whom the fact that entry to a particular piece of land is denied by the Government, is of itself a sufficient reason to fight for the right to make such entry. The Oklahoma fight—of which the court will probably take judicial notice—is a strong instance in point. The mere fact that settlers were forbidden to go upon a particular piece of land was sufficient to bring them in thousands to the border, cause them to cross the line, making infinite trouble and cost to the Government, while to reach that line they went through miles and miles of infinitely better land than any in that Territory, which was absolutely open to their occupancy and settlement under both the homestead and preemption laws of the United States.

The real settlers in this case, and those who are alone entitled to the consideration of the court, are the purchasers of this land from the Missouri, Kansas & Texas, which held it by the sacred right of a patent from the Government, which they had a right to believe would protect them in their homes; and their only protection is through the action of this court. It is a fact, and a matter of common notoriety, that the Missouri, Kansas & Texas is hopelessly insolvent and in the hands of receivers, and that its warranty of title to the numerous industrious and law-abiding citizens who have built their homes upon this land on the faith of the action of the Government, is absolutely worthless.

Resting secure, as they might well do, in the belief that they owned their homes by virtue of patents from the United States to their grantor, they have pursued their vocations in peace and quiet, while the howl for the vacation of this grant has been made by men who neither occupied, nor hoped to occupy, these lands, but did hope to obtain them by virtue of

their pretended settlements for speculative purposes, and with the intent to bleed the men who own and occupy them.

To authorize this court at this late day to vacate the title by which these men hold their lands, requires a strong, clear and unquestionable showing, not only that the Government ought not in the first instance to have patented them to the appellee, but that such patents were obtained by fraud, misrepresentation and concealment of the facts which could not have been known to the officers of the Government at the time they certified and patented these lands. No such showing has been made in this case, and no such showing can be made; and it is confidently submitted that this court will not, at the instigation of alleged settlers who are not settlers, disturb the title of twenty years. It may be added, that Mr. Justice BREWER, in discussing this case, holds that equity does not interfere when there is a more adequate remedy at law, and that all these settlers can, under the settled practice of Kansas, obtain full protection of their individual rights without the interference of the United States as plaintiff; and he further suggests, that under the ruling of this court, in *United States vs. San Jacinto Tin Company*, 125 U. S. 273, "It is questionable whether the Government can maintain a bill to set aside a patent in order simply to protect the rights of an individual claimant."

There is appended hereto for the use of the court, a copy of the opinion of Mr. Justice BREWER in this case.

A. L. Williams.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

THE UNITED STATES)
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *et al.*)

OPINION.

BREWER, J.: This is a bill filed by the Government to set aside the patent to certain even-numbered sections of land patented to the Missouri, Kansas & Texas Railway Company. The patentee, and certain grantees from it of various sections, are made parties defendant. All of them joined in a demurrer to the bill, and the questions are now presented on such demurrer. Some years since the Government filed a similar bill to set aside patents to the same patentee for odd-numbered sections. That case on final hearing was submitted to me, and decided in favor of the Government. (25 Fed. Rep. 243.) On an appeal to the Supreme Court the judgment of the Circuit Court was reversed, and the case remanded, with instructions to dismiss the bill. (118 U. S. 682.) The opinion filed in that case by the Supreme Court is earnestly criticised by the learned counsel for appellant, and several pages of their brief are devoted to this criticism. Although such opinion was different from my own, and resulted in the reversal of my judgment, it does not become me to criticise it in the least. On the other hand, it is my duty as a judge of a subordinate court to loyally accept it in all its parts as a correct interpretation of the law. If it be true as counsel say, that there be errors of fact and of law in it, that court when its attention is called to the matter will undoubtedly make the correction; meantime it is my duty to follow it both in letter and spirit. I premise this because in my

judgment it avoids the necessity of discussing some of the questions discussed with great elaboration by counsel; I may also add that in view of the magnitude of the interests involved, there is a certainty that this case will be taken to the Supreme Court for review, hence extended discussion on my part of the questions is unnecessary.

It is insisted in the first place that these lands were not the subject of grant, because of the New York Indian Reservation created by the treaty of 1838. (7 U. S. Stat. 550.) With respect to that question, it is enough to say that if the even-numbered sections were not subject to grant, neither were the odd-numbered sections; and in the case in the 118th U. S. the sixth proposition made by counsel, as appears from their brief, was the same as is now suggested; and while that question was not in terms discussed by the court, it closes its opinion with these words:

"There are other grounds urged for granting the relief sought by the bill, but they are not sufficient to justify such a decree, nor are they important enough to require further discussion here."

In view of that expression of opinion from the Supreme Court, it is unnecessary if not improper for me to enter into any discussion of the matter.

The second proposition is, that the act of March 3, 1863, making the grant in aid of the L. L. & G. road expressly reserved these sections to the United States, and the act of July 26, 1866, does not repeal the former reservation, but recognizes and reënacts the same reservation; and also that the act of 1866 is not applicable to these lands. It seems to be conceded by the Supreme Court in the opinion referred to, that if these acts are to be treated as distinct grants to independent roads, an argument kindred to this would have great force; but the judgment of that court was that the acts of

1863, 1864 and 1866 were to be taken and construed as *in pari materia*, and with the sole object of building one road. Putting that construction upon these various statutes, and regarding them in the same light which the Supreme Court seems to have regarded them, the latter acts must be treated as rather supplementary than independent, and construing them in that way the antagonism springing from their reservations disappears. If the later act merely extends or supplements the earlier acts, then they cannot be construed as independent grants nor as antagonistic. In that view the effect which has been given to these reserving clauses in other cases ceases to have operating force here, and this proposition must also be overruled. Again, it is insisted that the road was not built on the line of the definite location, but deflects in some instances therefrom, and near the city of Humboldt to the distance of two miles and a half, and has been since that time operated on the line as built, hence by reason of its first failure to construct and its subsequent failure to operate and maintain on the line of definite location it is insisted that the grant never became operative, and the officers of the Land Department exceeded their powers in issuing patents and that there is a breach of a condition subsequent. It must be noticed that this question does not arise upon an application of the road for patents for these lands, for they were issued in 1873. The department officers then accepted the road as constructed so nearly upon the line as to comply with the conditions of the grant. Fourteen years thereafter, after the land thus patented has been largely if not entirely sold by the patentee, this bill is filed. It is obvious that the question presents itself under very different aspects now from what it would then. The executive officers of the government have certain duties of supervision in reference to the execution of grants made by Congress and

when they have acted and their action has been unchallenged for a long series of years, and rights of property have been built up on the faith of their action, a very clear case should be presented before the titles thus resting for years upon that action are disturbed. In the case from the Supreme Court, *supra*, it observes:

"And lastly, while we are not disposed to hold the action of the officers of the Land Department of the Government as absolutely conclusive upon such a subject as this, we see no reason why their deliberate action, with careful attention, and all the means of ascertaining what was right, should be set aside in this case."

Again, in the *Maxwell Land Grant* case, 121 U. S. 381, the Supreme Court makes these comments:

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof."

These observations of the Supreme Court admonish me that a patent once issued from the General Government is not lightly to be disturbed, and that the perfect title supposed to be conveyed thereby must always be upheld, unless it be manifest that there has been in its issue a clear depart-

ure from the authority granted. If this be true in respect to a recent patent, much more is it true in reference to a patent so old as this. Parties place faith, and should place faith, in the action of the Government, and rely upon the title which its patent conveys; and when, as appears in this case, many parties have purchased in perfect reliance upon the title of the patent, and many years have passed with it unchallenged, common fairness requires that the title thus apparently conveyed should be sustained, unless it be very clear that there was a want of authority to issue it. Now generally I may observe in this case that the construction of the various acts is not clear. The elaborate briefs prepared by counsel on each side indicate that the manner of construction is a doubtful one. When the officers charged with the primary execution of the duty of construction have discharged that duty, and placed a certain construction upon these acts, and issued patent in accordance therewith, and that construction has been accepted unchallenged for a long series of years, then the court may well hesitate before it says that that construction was improper, and the patent issued without authority. These general considerations are also an excuse for not entering upon a more careful and elaborate discussion of the various questions presented by counsel.

One single matter, however, requires notice, and that is the claim that the patentee received more lands than it was entitled to under this grant; that the lands in controversy were the last selected and patented, and therefore the ones whose title may properly be challenged. In respect to this, it may be observed that even if more lands were patented than the company was entitled to, a grave question arises and is discussed by counsel, whether the title should fail to those last selected, or those most remote from the granted limits. I do not, however, deem it necessary to enter into a discus-

sion of this question, and for this reason: It is a well-known fact that this road for many miles runs through the Osage Indian lands, and that by the decision of the Supreme Court of the United States, none of these lands passed under this or any other grant to railroad companies. Now the act of 1866, in making the grant, provides:

"But in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, *or that the same has been reserved to the United States for any purpose whatever*, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated," etc. (14 U. S. Stat. at Large, 289.)

Now if the right of selection extended to the quantity of lands sufficient to make up the losses caused by the existence of the Osage Indian Reservation, then I do not understand that the company has received its full grant of lands, and that such is a true construction of this grant seems to be settled by the decision of the Supreme Court in the case of *R. R. Co. vs. Barney et al.*, 113 U. S. 618.

So far as any claim is made in reference to particular tracts upon which a homestead or preëmption settlement was made before any rights of the railroad company attached is concerned, it is enough to say that equity does not interfere when there is a full and adequate remedy at law, and that these parties can under the settled practice of Kansas obtain full protection of their individual rights without the interference of the United States as plaintiff. Furthermore, it may be observed that under the ruling in *The United States vs. San Jacinto Tin Co.*, 125 U. S. 273, it is questionable whether

the Government can maintain a bill to put aside a patent in order simply to protect the rights of an individual claimant.

I deem it unnecessary to add more, for reasons heretofore stated. I have not entered into as full a discussion as the importance of the questions would ordinarily demand, but for the reasons indicated I think that the demurrer to the bill should be sustained and the bill dismissed; and it is so ordered.